

DOCKET

No. 88-1264-CFH
Status: GRANTED

Title: James Saffle, Warden, et al., Petitioners
v.
Robyn Leroy Parks

Docketed:
January 26, 1989

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Nance, Robert A.

Counsel for respondent: Berger, Vivian

Entry	Date	Note	Proceedings and Orders
1	Jan 26 1989	G	Petition for writ of certiorari filed.
2	Jan 26 1989		Appendix of petitioner Saffle, Warden, et al. (3 volumes). filed.
6	Feb 8 1989		Order extending time to file response to petition until April 3, 1989.
7	Mar 31 1989		Brief of respondent Robyn Leroy Parks in opposition filed.
8	Mar 31 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Apr 5 1989		DISTRIBUTED. April 21, 1989
10	Apr 24 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Apr 24 1989		Petition GRANTED. *****
12	May 4 1989	G	Motion of respondent for appointment of counsel filed.
13	May 5 1989		DISTRIBUTED. MAY 11, 1989. (MOTION FOR APPOINTMENT OF COUNSEL).
14	May 15 1989		Motion for appointment of counsel GRANTED and it is ordered that Vivian O. Berger, Esq., of New York, New York, is appointed to serve as counsel for the respondent in this case.
16	May 25 1989		Order extending time to file brief of petitioner on the merits until June 22, 1989.
17	Jun 1 1989		Brief amicus curiae of California filed.
18	Jun 22 1989		Joint appendix filed.
19	Jun 22 1989		Brief of petitioners Saffle, Warden, et al. filed.
22	Jul 3 1989		Order extending time to file brief of respondent on the merits until August 9, 1989.
23	Aug 9 1989		Brief of respondent Robyn Leroy Parks filed.
24	Aug 24 1989		Record filed.
		*	USCA 10-6 vol.
25	Aug 24 1989		CIRCULATED.
26	Aug 28 1989		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 1, 1989. (1ST CASE)
27	Sep 13 1989	G	Motion of petitioners for leave to file a reply brief, out-of-time, filed.
28	Sep 20 1989		DISTRIBUTED. OCTOBER 6, 1989.
29	Oct 10 1989		Motion of petitioners for leave to file a reply brief, out-of-time, GRANTED.
30	Oct 10 1989	X	Reply brief of petitioners Saffle, Warden, et al. filed.
31	Nov 1 1989		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

88-1264

Supreme Court, U.S.

FILED

JAN 26 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. _____,
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

ROBYN LEROY PARKS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

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January, 1989
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No. _____,

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CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

ROBYN LEROY PARKS,

Respondent.

QUESTION PRESENTED

Whether in the sentencing phase of a
capital murder prosecution the Eighth

Amendment prohibits an "anti-sympathy" jury instruction which states, in pertinent part:

You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as juror impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

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Cases Cited

- Byrne v. Butler, 847 F.2d 1135
(5th Cir. 1988) 11, 33, 34, 35, 37
- California v. Brown, 479 U.S.
538 (1987) 10, 11, 12, 15, 16, 18,
20, 25, 28, 29, 33, 34,
36, 37
- Louisiana v. Copeland, 530
So.2d 526 (La. 1988) 11, 35, 36
- Mills v. Maryland, 486 U.S.
108 S.Ct.
100 L.Ed.2d 384 (1988) 26, 27
- Parks v. Brown, 840 F.2d 1496
(10th Cir. 1987) 1, 3
- Parks v. Brown, 860 F.2d 1545
(10th Cir. 1988) 1, 4
- State v. Scott, 497 N.E.2d 55
(Ohio 1986), cert. denied,
107 S.Ct. 1386 (1987) 34, 35
- State v. Steffen, 509 N.E.2d
383 (Ohio 1987), cert.
denied, 108 S.Ct. 1089
(1988) 11, 34

Statutes Cited

- 28 U.S.C. § 1254(1) 2
- 28 U.S.C. § 2254 3

The Attorney General of Oklahoma, Robert H. Henry, on behalf of the Warden of the Oklahoma State Penitentiary, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals sitting en banc (Appendix A, submitted herewith) is reported as Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988). The panel opinion of the Court of Appeals is reported as Parks v. Brown, 840 F.2d 1496 (10th Cir. 1987) (Appendix B, submitted herewith). The opinion of

the District Court (Appendix C, submitted herewith) is not reported.

JURISDICTION

The judgment of the Court of Appeals sitting en banc (Appendix A, submitted herewith) was entered on October 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

Respondent, hereinafter Defendant, was convicted of murdering a gas station attendant and was sentenced to die in the District Court of Oklahoma County, Oklahoma. After exhausting his

state remedies, Defendant sought a writ of habeas corpus in the United States District Court for the Western District of Oklahoma under 28 U.S.C. § 2254. After the district court denied the writ the Defendant appealed to the United States Court of Appeals for the Tenth Circuit. A divided three judge panel of that court affirmed the district court's denial of habeas relief. Parks v. Brown, 840 F.2d 1496 (10th Cir. 1987). The Defendant sought and was granted rehearing en banc by the Court of Appeals. A six judge majority of the Court of Appeals, speaking through Judge Ebel, vacated the Defendant's death sentence finding sentencing phase Jury Instruction No. 9 (the "anti-sympathy" instruction) violated the Defendant's rights under

the Eighth Amendment. Parks v. Brown, 860 F.2d 1545, 1556 (10th Cir. 1988). Four judges of the Court of Appeals joined in a strong dissent. Parks v. Brown, 860 F.2d 1545, 1565 (10th Cir. 1988), Opinion of Anderson, J., concurring and dissenting in part.

During the sentencing proceedings at Defendant's trial, Defendant's father testified about the Defendant's character, friendly personality, and childhood circumstances, including the facts that the Defendant was the product of a broken home and his father had served time in prison. The trial court did not exclude any mitigating evidence offered by the Defendant during the sentencing proceedings.

With regard to mitigating

circumstances, Instruction No. 6 in the sentencing phase stated:

You are further instructed that mitigating circumstances, if any, must also be considered by you, and although they are not specifically enumerated in the statutes of this State, the general law of Oklahoma and the United States sets up certain minimum mitigating circumstances for you to follow as guidelines in determining which sentence should be imposed in this case. You must consider all the following minimum mitigating circumstances and determine whether any one or more of them apply to all of the evidence, facts and circumstances of this case. You are not limited in your consideration to the minimum mitigating circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine.

The minimum mitigating circumstances are:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
4. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;
5. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;
6. The defendant acted under duress or under the domination of another person;
7. At the time of the murder the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the

requirement of law was impaired as a result of mental disease or intoxication;

8. The age of the defendant at the time of the crime.

R. Vol. II, Instruction No. 6.

Instruction No. 9 in the sentencing phase stated in part:

You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as juror impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

R. Vol. II, Instruction No. 9.

During the closing argument the prosecutor stated:

Now before you would be authorized to even think about giving the death penalty, you must find that one of the aggravating circumstances existed.

Tr. V, p. 696. Thereafter, the prosecutor discussed his theory of why the evidence supported the three aggravating circumstances which had been plead against the Defendant. After completing his discussion of the aggravating circumstances the Prosecutor told the jury:

Now, the Court has also given you that once you have decided on aggravating circumstances -- and of the three that's listed, before you can consider the death penalty, you must consider and agree that there is one -- at least one aggravating circumstance. You can consider --you can find that there's one, or there's two or that there's three; but you must find one before you can consider the death penalty. Now once you've found at least one, then you must go, under the law, over to the mitigating.

Tr. V, p. 701. Thereafter, the prosecutor discussed why the first two mitigating circumstances in the Court's

instruction to the jury did not exist. Then he made the following comment:

And "number three" -- you see, the Court has to give these. The law says he's got to give them, and this is the law, and you must consider them.

Tr. V, p. 702. After completing his analysis of the mitigating circumstances the prosecutor stated:

And, now the Court also tells you, you can consider anything else that you want to, to mitigate the penalty of death and the term of life. You can consider anything you want to in addition to what he's told you. And, then in your consideration -- now here's my main point -- in your consideration of all of these things or anything else you want to consider -- "and determine whether one or more of them apply to all the evidence, facts and circumstances of this case." In other words, whether or not you feel like that these mitigating circumstances are so strong in favor of the Defendant that it's just going to eliminate and do away with the aggravating circumstances.

Tr. V, pp. 703-704.

REASONS FOR
GRANTING THE PETITION

This case presents an important question concerning the application of the Eighth Amendment to capital murder sentencing proceedings. The Court below held unconstitutional the "anti-sympathy" jury instruction because it believed the instruction created an impermissible risk that the jury did not fully consider the Defendant's mitigating evidence in making its sentencing decision, even though both the trial court and the prosecutor had instructed the jury that it must consider the mitigating evidence. The conclusion of the court below cannot be reconciled with this Court's opinion in California v. Brown, 479 U.S. 538 (1987). Further, the opinion of the Tenth Circuit is in conflict with the

decision of the Fifth Circuit in Byrne v. Butler, 847 F.2d 1135 (5th Cir. 1988), with the opinion of the Ohio Supreme Court in State v. Steffen, 509 N.E.2d 383, 396 (Ohio 1987), cert. denied, 108 S.Ct. 1089 (1988), and with the decision of the Supreme Court of Louisiana in Louisiana v. Copeland, 530 So.2d 526 (La. 1988).

The Constitution does
not require sympathy in
capital sentencing.

In California v. Brown, 479 U.S. 538 (1987) the Court summarized the Eighth Amendment law of capital punishment as requiring, first, death penalty statutes be structured so as to prevent the penalty from being administered in and unpredictable fashion, and second, the court stated that a capital defendant must be allowed to introduce

any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Id., 479 U.S. at 541. To these two Eighth Amendment prerequisites to a valid death sentence a narrow majority of the Tenth Circuit, speaking through Judge Ebel, has added a right to appeal for mercy, humane treatment, compassion, and sympathy. App. A at 50-51. While this is not a case in which the defense was precluded from introducing mitigating evidence or the jury was precluded from considering that evidence, the Tenth Circuit majority struck down the anti-sympathy instruction because it found that instruction created an impermissible

risk that the jury did not fully consider the Defendant's mitigating evidence in making its sentencing decision. App. A at 53. The court below went on to state that sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character. App. A at 55. Thus, the court below entered the realm of the mental and emotional processes of jurors to create a constitutional requirement that sentencing jurors not merely consider mitigating factors but "fully consider" them with a sympathetic attitude.

Although not articulated by Judge Ebel's opinion for the majority, Judge McKay's opinion, concurring and dissenting in part, articulates what

may be an underlying premise of them majority's opinion. Judge McKay calls this an "ordinary murder case" in which the imposition of the death penalty strongly suggests the jury conducted its task improperly. Opinion of McKay, J., concurring in part and dissenting in part, App. A at 7. According to Judge McKay, because this is not one of the "extreme cases" which justify the death penalty, special scrutiny is necessary in order to insure the jury was not improperly guided in its decision making process. Id., App. A at 7. The majority below may have believed that "something" had to go wrong to result in the death penalty for an "ordinary murder" and that "something" was a failure of the jury to adequately consider the

defendant's case in mitigation. Thus, resentencing was necessary, even though the trial court in no way impeded the Defendant's case in mitigation. We believe this special scrutiny of "ordinary murders" presents an extreme danger that appellate federal courts will substitute their views of "ordinary murder" cases for those of the jurors who hear the case, even in the absence of interference with the case in mitigation.

We believe the opinion of the court below cannot be squared with the requirement of California v. Brown, supra, that the proper focus is on what a reasonable juror could have understood the charge to mean. Id., 479 U.S. at 541. To determine how a reasonable juror could interpret an

instruction, we must focus initially on the specific language challenged and, if that language fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. Id., 479 U.S. at 541. The court below ignored almost all of this court's opinion in Brown, and distinguished the jury instruction in the present case from the California instruction upheld in Brown because the latter instruction prohibited "mere" sympathy, while the instruction in the present case advises jurors to avoid "any influence of sympathy, sentiment, passion, prejudice" or other arbitrary factors. App. A at 35. We believe this distinction is one which would escape a lay juror.

Instruction No. 6 in the sentencing phase, set out above, advised the jury in no uncertain terms that it must consider not only certain minimum mitigating circumstances but that jurors may consider any other or additional mitigating circumstances, if any, that they found from the evidence to exist in the case. The prosecutor further informed the jurors of their obligation to consider the mitigating evidence and touched on each of the specific "minimum" mitigating circumstances in turn before telling the jurors that they could consider anything else that they want to, to mitigate the penalty of death and the term of life (Tr. Vol. V, pp. 701-04). Thus, the jurors were informed by both the court and the prosecutor to

consider the Defendant's case in mitigation but to do so impartially, conscientiously, and faithfully under their oaths and to return such verdict as the evidence warrants when measured by these instructions.

In light of the evidence, argument, and instructions on mitigating evidence, no reasonable juror would interpret the admonition to avoid the influence of sympathy as a secret code designed to denigrate the Defendant's case in mitigation. Rather, as was the case in Brown, a reasonable juror would consider sympathy, sentiment, passion, and prejudice to be no more than a catalogue of the kind of factors that could improperly influence their decision to vote for or against the death penalty. Id., 479 U.S. at 543.

The trial court instructed the jury against sympathy, sentiment, passion, prejudice, or any other arbitrary factor when imposing sentence and further informed the jurors that they should discharge their duty impartially, conscientiously, and faithfully under their oaths. Thus, the instruction directed the jurors away from extraneous emotional factors and toward an impartial and conscientious performance of their duties based upon the evidence. As in Brown, the challenged instruction serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors. Also, the instruction limits the jury's consideration to matters

introduced in evidence before it fostering the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case. Id., 479 U.S. at 543. Likewise, by limiting the jury's sentencing consideration to record evidence, the instruction also insures the availability of meaningful judicial review which is another safeguard that improves the reliability of the sentencing process. Id., 479 U.S. at 543. Finally, as in Brown, an instruction toward an impartial and conscientious verdict and away from emotion is far more likely to benefit a capital murder defendant than to harm him. Id., 479 U.S. at 543.

At his trial the Defendant received individualized consideration of his

mitigating circumstances and was no way restricted in his ability to introduce mitigating evidence or to argue mitigation to the jury. Yet the court below has now imposed as an Eighth Amendment requirement the necessity of the jury to not only consider the mitigating evidence but to "fully consider" the mitigating evidence with an attitude of sympathy. Yet the court below points to no evidence in the record, or plausible reason to believe, that the jury actually did not "fully consider" Defendant's mitigating evidence. Short of deposing the jury such evidence would be impossible to find. Thus, the court below justifies its ruling by the impermissible risk the jury did not "fully consider" the mitigating evidence. This heightened

requirement of full consideration by a sympathetic jury is a step backwards from this Court's long-standing commitment that capital sentencing be, and appear to be, based on reason rather than caprice or emotion. As Judge Anderson correctly stated in writing for himself and the three other dissenting judges in the court below:

The requirement that sentencing decisions must be rational has been emphasized over and over again by the Supreme Court since Furman v. Georgia, 408 U.S. 238 (1972).

In Gardner v. Florida, 430 U.S. 349, 358 (1976), the Court stated: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." That standard has been referred to repeatedly by the Court in its later decisions. Sumner v. Shuman, 107 S.Ct. 2716, 2723, n.5 (1987) ("sentence imposed at the penalty stage should reflect a

reasoned moral response to the defendant's background, character, and crime" quoting California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring)); Booth v. Maryland, 107 S.Ct. at 2536 ("[A]ny decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'" quoting Gardner v. Florida, 430 U.S. at 358; "reasoned decision making" required in capital cases); McCleskey v. Kemp, 107 S.Ct. 1756, 1789 (1987) ("[W]e have demanded a uniquely high degree of rationality in imposing the death penalty." (Brennan, dissenting)); Caldwell v. Mississippi, 472 U.S. 320 (1985) ("[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Id. at 329; "[T]his Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Id. at 329, n.2, quoting Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J.,

concurring)); Pulley v. Harris, 465 U.S. 37, 53 (1984) (upholding the constitutionality of a state statute which guaranteed that the jury's discretion will be guided and its consideration "deliberate"); California v. Ramos, 463 U.S. 992, 1018-21 (1983) (Marshall, dissenting) (capital punishment decisions must be "rational," "meaningful," "principled," and "reliable"); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (death sentence must be based on reason rather than caprice or emotion, quoting Gardner v. Florida, 430 U.S. at 358); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (reason rather than caprice or emotion required); Gregg v. Georgia, 428 U.S. 153, 190 (1976) ("reasoned determination" by a jury); Jurek v. Texas, 428 U.S. 262, 274 (1976) (Texas procedure "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender.") (emphasis supplied); Proffitt v. Florida, 428 U.S. 242, 259 (1975) ("[T]here shall be an informed, focused, guided, and objective inquiry into the question whether [a convicted person] should be sentenced to death.").

Opinion of Anderson, J., concurring and dissenting in part, App. A at 18-22.

Judge Anderson and the dissenting judges below agreed with Justice O'Connor that the sentencing posed at the penalty stage should reflect a reasoned moral response to the Defendant's background, character, and crime rather than mere sympathy or emotion (App. A at 18, citing California v. Brown, 479 U.S. at 545, Opinion of O'Connor, J., concurring). We likewise agree that the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the guilt of the defendant and not an emotional response to the mitigating evidence. Id. As we have demonstrated, nothing in these sentencing proceedings mislead the jury

into believing that it should not consider the Defendant's case in mitigation. Quite the contrary, even the prosecutor reinforced the jury's duty to consider the evidence in mitigation. The Defendant was sentenced in a proceeding which guided and directed the jury sentencing discretion and which he could submit to the jury his case in mitigation without interference by the court. The Constitution requires no more.

The court below misapplied Mills v. Maryland, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 384 (1988) to the present case. In Mills the verdict form was ambiguous and could reasonably be read in two ways, one of which could result in a verdict of death when jurors found mitigating circumstances were present

but did not agree unanimously on which mitigating factors were present in the case. Id., 100 L.Ed.2d at 394. This Court found a substantial possibility that the verdict rested on the improper ground and remanded for resentencing. Id., 100 L.Ed.2d at 395-96. The court below applied this "substantial possibility" language to the entirely different circumstance in the present case and remanded for resentencing because the jury verdict in this case may have rested on the "improper" (i.e. non-sympathetic) ground (App. A at 56-57). Unlike in Mills, the jury in the present case was not in danger of being tricked into disregarding the Defendant's case in mitigation. The admonition against sympathy, sentiment, passion, and prejudice, and in favor of

an impartial and conscientious discharge of their duty as jurors could not be construed by a reasonable juror as an instruction to disregard the case in mitigation. Thus, the instruction passes constitutional muster and the court below erred in striking it down.

Even if Instruction No. 9 were unconstitutional, a proposition we obviously contest, following the second stage of this Court's formula from Brown, we must review the instruction as a whole to see if the entire charge delivered a correct interpretation of the law. Id., 479 U.S. at 541. Instruction No. 6 unquestionably did correctly instruct the jury that they must consider not only the eight listed "minimum" mitigating circumstances but any other or

additional mitigating circumstances they might find from the evidence to exist in the case. Thus, the Defendant received the "constitutionally indispensable" consideration of his mitigating evidence during the sentencing. Id., 479 U.S. at 541. The Defendant received the prerequisites the Eighth Amendment imposes upon a valid death sentence. The court below departed from this Court's pronouncement in California v. Brown, supra, and imposed yet a third prerequisite based upon the sheer speculation that the jury may not have "fully considered" the Defendant's case in mitigation. We respectfully ask this Court to grant our Petition for Writ of Certiorari, review the decision of the court below, and reverse it.

The decision of the court below will disrupt the administration of criminal justice.

In striking down the "anti-sympathy" instruction, an instruction which even-handedly prohibited sympathy, sentiment, passion or prejudice, either for or against the Defendant, the court below has sent a message to the defense bar that appeals to sympathy on behalf of their Defendants are not only permissible but may be constitutionally required to be heard by trial courts. If the opinion of the court below is upheld, trial courts will be unable to restrict emotional appeals on behalf of Defendants for fear of committing constitutionally reversible error. Two further results, neither of which are desirable, may obtain. First, prosecutors may feel they have a

license to make pleas for sympathy for victims or families, at least so long as that sympathy is "tethered" to the evidence of the crime. Secondly, because the court below correctly believes that sentiment, passion or prejudice are "obviously improper factors" (App. A at 39) prosecutors may be foreclosed from making a countervailing emotional plea under the accusation that sympathy is the exclusive province of the defendant and sentiment, passion, and prejudice are constitutionally improper. In either event, capital sentencing will sink into the realm of the emotional rather than relying upon the objective factors which have characterized this Court's opinions on capital sentencing.

Further, because this instruction, or instructions like it, are common in capital sentencing in Oklahoma, the opinion of the court below will have an impact going far beyond the specific case of Robyn Parks. The already protracted process of constitutional litigation will be further delayed if the opinion of the court below stands. Many condemned murderers may ultimately be released because their jurors may not have "fully considered" their cases in mitigation with the proper sympathetic frame of mind. To a general public already bewildered by the inability of the courts to do justice in capital cases such a result will only make worse the growing disrespect of the public for our courts.

The decision of the court below creates a split in the circuits.

In Byrne v. Butler, 847 F.2d 1135, 1139-40 (5th Cir. 1988), the Fifth Circuit, by adopting the reasoning of the district court, came to precisely the opposite conclusion as did the court below in analyzing an "anti-sympathy" instruction. Contrary to the Tenth Circuit, the Fifth Circuit held that this Court in California v. Brown, supra, did not hold that the qualifier "mere" was necessary to avoid a constitutional violation. Byrne, supra, 847 F.2d at 1139. The court in Byrne, relying on California v. Brown, found that the trial court's admonition to the jury not to be influenced by sympathy, passion, prejudice or public opinion did not limit the jury

consideration of mitigating circumstances. Id., 847 F.2d at 1137, 1139-40.

Further, the Ohio Supreme Court has rejected a challenge to a jury instruction to disregard feelings of sympathy in penalty phase deliberations, relying in part on California v. Brown, supra. State v. Steffen, 509 N.E.2d 383, 396, cert. denied 108 S.Ct. 1089 (1988). The Court in Steffen, also relied on its earlier cases, one of which, State v. Scott, 497 N.E.2d 55, 68 (Ohio 1986), cert. denied, 107 S.Ct. 1386 (1987) which upheld an "anti-sympathy" instruction which stated:

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions

of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

497 N.E.2d at 68. Such instructions are no less forceful than the Oklahoma instruction invalidated by the Tenth Circuit. Yet, despite the absence of the talismanic word "mere" modifying "sympathy" the Ohio Supreme Court has found they pass constitutional muster.

The opinion of the Fifth Circuit in Byrne, by adopting the district court opinion, also relied upon an opinion of the Louisiana Supreme Court, State v. Copeland, 530 So.2d 526, 537 (La. 1988). Byrne, supra, 847 F.2d at

1140. The Louisiana Supreme Court in Copeland, dealt with a guilt phase instruction which stated that the jury was not to be influenced by sympathy, passion, prejudice, or public opinion and was to reach a just verdict. The Court stated that a similar instruction, if given during the penalty phase, does not unduly prejudice a defendant relying, on two of its earlier opinions and this Court's opinion in California v. Brown. Thus, while the Louisiana Supreme Court in Copeland did not face a sentencing phase instruction it indicated clearly that it would find such an instruction constitutionally permissible. Copeland, supra, 530 So.2d at 537. -

Writing for the dissent in the court below, Judge Anderson stated that the

majority's disagreement with the Fifth Circuit in Byrne goes farther than splitting the circuits and represents an extreme position lacking any support at all in existing cases. Opinion of Anderson, J., concurring and dissenting in part, App. A at 23. The circuits are clearly split and the Fifth Circuit's approach is the correct one. The court below took California v. Brown, supra, an opinion approving an anti-sympathy instruction, and turned it into an opinion compelling the conclusion that the absence of the word "mere" in the present instruction renders it unconstitutional. We ask this Court to grant a Writ of Certiorari to resolve this split in the circuits between the Tenth and Fifth

Circuits in favor of the position
adopted by the Fifth Circuit.

CONCLUSION

The Petition for a Writ of
Certiorari should be granted.

Respectfully submitted,

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JANUARY, 1988

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APPENDIX

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88-1264

JAN 26 1989

JOSEPH F. SPANIOI, JR.
CLERK

No. _____,
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October Term, 1988

JAMES SAFFLE, WARDEN,
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Respondent.

APPENDIX A TO
PETITION FOR A WRIT OF CERTIORARI TO
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ROBERT H. HENRY
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January, 1989
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10TH CIRCUIT OPINION EN BANC
OPINION OF COURT BY JUDGE EBEL

PUBLISH
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBYN LEROY PARKS,)		
)	
Petitioner-)	
Appellant,)	
vs.)	No. 86-1400
)	
JOHN N. BROWN,)	
WARDEN, Oklahoma)	
State Penitentiary,)	
McAlester, Oklahoma;)	
LARRY MEACHUM,)	
Superintendent,)	
Oklahoma Department)	
of Corrections;)	
and MICHAEL C.)	
C. TURPEN,)	
Attorney General)	
of Oklahoma,)	
)	
Respondents/)	
Appellees.)	

Appeal from the United States
District Court for the Western District
of Oklahoma (D.C. No. CIV-84-1618-T)

ON REHEARING EN BANC

Vivian Berger, New York, New York, (Lewis Barber, Jr., Oklahoma City, Oklahoma, with her on the brief), for Petitioner-Appellant.

Robert A. Nance, Assistant Attorney General, Deputy Chief, Federal Division, (Robert H. Henry, Attorney General of Oklahoma, with him on the brief), Oklahoma City, Oklahoma, for Respondents-Appellees.

Before HOLLOWAY, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

EBEL, Circuit Judge, delivers the opinion and judgment for the Court in which LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, AND BRORBY, Circuit Judges, join as to Part I, and HOLLOWAY, Chief Judge, and MCKAY, LOGAN, SEYMOUR, and MOORE, Circuit Judges, join as to Part II.

In 1978, an Oklahoma jury convicted petitioner-appellant, Robyn Leroy Parks, of first-degree murder and, after further hearing, sentenced him to death. After exhausting his state remedies, he sought and was denied habeas corpus relief in the United

States District Court for the Western District of Oklahoma. He then appealed to this court, and a divided panel affirmed the district court. We agreed to a rehearing en banc on two of petitioner's arguments, and we now reverse his death sentence.

At petitioner's trial, the state established the following. Abdullah Ibrahim, a native of Bangladesh, worked part-time at a gas station in Oklahoma City, Oklahoma. On the morning of August 17, 1977, a motorist stopped at the gas station and found Ibrahim dead inside the station booth. Ibrahim died from a single gunshot wound in the chest from a .45-caliber pistol. The police found an unused gas credit card slip in the booth, with the license number "XZ-5710" written on it. The

police traced this number to an automobile in which Parks had an interest.

An informant told police that Parks was involved in the murder and gave police an address at which Parks might be found. Although the police did not find Parks at that address, they found a car in the vicinity of the address with the license number "XZ-5710." Inside the car they found a prescription-drug bottle with Parks' name on it, a belt with the initials "R.L.P.," and eight .45-caliber bullets.

The police then talked with Parks' former roommate, James R. Clegg, Jr. After being offered a reward, Clegg allowed police to tape record two telephone conversations that he had

with Parks, who was then in California. During the first conversation, Parks admitted to shooting the gas station attendant. Parks told Clegg that after he saw the attendant come out of the station booth and look at his license plate number, he was afraid that the attendant would call the police because he was using a stolen credit card to pay for the gas. He said that he was concerned about being stopped by the police because he had guns and dynamite in his car. During the second conversation, Parks told Clegg where he had hidden the murder weapon. At that location, police found a .45-caliber pistol and ammunition.

In the District Court of Oklahoma County, a jury found Parks guilty of the first-degree murder of Ibrahim.

After further hearing, the same jury sentenced him to death. The jury found only one of the three statutory aggravating circumstances that were charged -- that the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." See 21 Okla. Stat. § 701.12.¹ Parks' conviction and sentence were affirmed on direct appeal by the Oklahoma Court of Criminal Appeals. Parks v. State, 651 P.2d 686 (Okla. Crim. App. 1982).

The United States Supreme Court denied

¹The sentencing jury rejected the other two aggravating factors alleged by the state: that defendant would probably commit crimes in the future, thus posing "a continuing threat to society," and that the murder was "especially heinous, atrocious or cruel."

certiorari. Parks v. Oklahoma, 459 U.S. 1155 (1983).

Parks subsequently sought post-conviction relief in the state courts of Oklahoma. The state district court denied relief, and the Oklahoma Court of Criminal Appeals affirmed in an unreported order and opinion. The United States Supreme Court again denied certiorari. Parks v. Oklahoma, 467 U.S. 1210 (1984).

Parks then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma. The district court denied relief, and Parks appealed to this court. A divided panel affirmed the district court's denial of habeas relief. Parks v. Brown, 840 F.2d 1496 (10th Cir. 1987). This court

agreed to a rehearing en banc, and we now reverse.

This rehearing focuses upon two basic issues, both arising from the penalty phase of petitioner's trial: (1) Whether the prosecutor's summation in the penalty phase concerning juror responsibility diverted the jury from considering the full extent of its responsibility for determining the life or death sentence, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985); (2)[a] Whether the penalty phase instruction "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence," influenced the jury improperly to discount mitigating evidence presented

by the defendant; and (2)[b] Whether the combination of the prosecutor's comments concerning the above instruction and the instruction itself, and the absence of any corrective instruction after the arguments, influenced the jury improperly to discount mitigating evidence presented by the defendant?²

²Although petitioner's trial counsel did not raise these issues as objections at trial, we nevertheless may consider them because the Oklahoma Court of Criminal Appeals reviewed them on direct appeal. See Parks v. State, 651 P.2d 686, 693 (Okla. Crim. App. 1982). "If a state court has reached the merits of a claim, a federal Habeas court may do the same despite the existence of a state procedural bar." Andrews v. Shulsen, 802 F.2d 1256, 1266 n.8 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1964, 95 L.Ed.2d 536 (1987). Although the prosecutor's remarks were only reviewed for "fundamental prejudice," that constitutes a sufficient decision on the merits by the state court. See Morishita v. Morris, 702 F.2d 207, 209 (continued...)

As to the first issue, we hold that the prosecutor's remarks did not violate Caldwell by improperly reducing the jury's sense of its responsibility for the sentencing decision. Therefore, we affirm the district court on that issue. With respect to the second issue, we hold that the anti-sympathy portion of the jury instructions, even when viewed independently from the prosecutor's anti-sympathy remarks, violated the petitioner's eighth amendment rights by creating an impermissible risk of influencing the jury to discount mitigating evidence presented by him. Because we find the anti-sympathy

²(...continued)
(10th Cir. 1983) (review for "fundamental fairness" by state court was a decision on the merits).

instruction to be unconstitutional, we reverse the district court to the extent that it upheld the constitutionality of the death sentence in this case, and we remand for further proceedings consistent with this opinion.

We begin our analysis of petitioner's claims by noting the special nature of the death penalty. Because of its severity and irreversibility, the death sentence is the "ultimate restraint." Cartwright v. Maynard, 822 F.2d 1477, 1483 (10th Cir. 1987) (en banc), aff'd, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). This qualitative difference from other punishments requires "a corresponding difference in the need for reliability in the determination

that death is the appropriate punishment in a specific case." Hoodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Lockett v. Ohio, 438 U.S. 586, 604 (1978). The Supreme Court has repeatedly stated that a high degree of scrutiny of the capital sentencing determination is required to ensure that the capital sentencing decision does not violate the eighth amendment prohibition against cruel and unusual punishments. See, e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983). Accordingly, we apply a heightened scrutiny to the prosecutor's statements and jury instructions challenged in this rehearing.

I.

THE PROSECUTOR'S COMMENTS REGARDING JURORS' RESPONSIBILITY.

Petitioner argues that certain statements made by the prosecutor during the penalty phase of the trial violated the rule of Caldwell v. Mississippi, 472 U.S. 320 (1985). The Supreme Court in Caldwell held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29. In that case the Court found that it was improper for a prosecutor to have stated to the jury that its decision was "automatically reviewable by the Supreme Court" because, among other

things, the statement carried with it "an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333.³

Here, petitioner challenges the following statements made by the prosecutor during the prosecutor's closing argument:

³The Court identified four dangers associated with such statements: (1) jurors might not understand that appellate courts are limited in their ability to review sentencing decisions; (2) the jury might be more willing to impose the death sentence as a sign of disapproval of the defendant's acts if they thought that any error could be corrected on appeal; (3) jurors, correctly assuming that a sentence of life in prison cannot be increased on appeal whereas a death sentence can be reduced if the appeals court desires, might impose the death penalty as a way of delegating the penalty decision; and (4) jurors might minimize the importance of their role and vote to impose the death penalty even if they were undecided. *Caldwell*, 472 U.S. at 330-33.

But, you know, as you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You just have become a part of the criminal-justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict -- once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal-justice system that says that when this type of thing happens, that whoever does such a horrible, atrocious thing must suffer death.

Now that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know.

Record, Vol. V, at 707-08.

Petitioner argues that those statements diluted the jurors' sense of responsibility for their decision in violation of *Caldwell*. Although we do not condone the statements made by the

prosecutor, we find that the statements did not reduce the jury's sense of its actual responsibility for the sentencing decision and therefore did not violate Caldwell.

A two-step inquiry is appropriate when examining alleged Caldwell violations. See Darden v. Wainwright, 477 U.S. 168, 184 n.15 (1986). First, the court should determine whether the challenged prosecutorial remarks are the type of statements covered by Caldwell. In other words, they must be statements that tend to shift the responsibility for the sentencing decision away from the jury. If so, the second inquiry is to evaluate the effect of such statements on the jury to determine whether the statements

rendered the sentencing decision unconstitutional.

The Supreme Court elaborated upon Caldwell in Darden v. Wainwright, 477 U.S. 168 (1986), when it stated that Caldwell applies only to comments that "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Id. at 184 n.15 (emphasis added). Thus, Caldwell is triggered only by statements that dilute the jury's sense of its actual role in the sentencing process. Further, Caldwell may address only statements which mislead the jury as to its role, either by omission or commission.⁴

⁴Darden appears to require an element of misleading before Caldwell (continued...)

We conclude that Caldwell is inapplicable here because, as in Darden, "none of the [prosecutor's] comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process." 477 U.S. at 184 n.15. However much the prosecutor in the instant case may have tried to diffuse the jury's moral responsibility for the death penalty, the actual role of the

⁴(...continued)
is violated, even though one of the dangers discussed in Caldwell did not involve any element of misleading or confusion. See footnote 3, *supra*. However, we need not determine whether a statement must be misleading before Caldwell is violated, nor do we need to decide whether the prosecutor's statements here were, in fact, misleading because of our threshold holding that Caldwell applies only to statements that diminish a jury's sense of its role in deciding whether to impose the death penalty and we have found no such statements here.

jury as the decision-making body that had the authority and responsibility to decide whether Robyn Parks should be sentenced to death was crystal clear.⁵

In evaluating the challenged statements, it is necessary to examine the context in which they were made. See Darden v. Wainwright, 477 U.S. 168, 179 (1986); Dutton v. Brown, 812 F.2d 593, 596 (10th Cir. 1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987). An examination of other statements by the prosecutor and statements by defense

⁵Because we find that Caldwell is not implicated in this case as a threshold matter, we need not decide whether the effect of the statements on the jury was sufficient to deny petitioner his eighth amendment rights, nor do we address here the appropriate standard of review to evaluate the effect upon the jury of a Caldwell-violative statement.

counsel supports our conclusion that the jury's sense of its actual responsibility and authority for making the sentencing decision was not diminished.

During his initial closing argument at the penalty phase of the trial, the prosecutor emphasized that the jurors had the actual responsibility for deciding the appropriateness of the death penalty. For example, immediately after the statements challenged here by the petitioner, the prosecutor told the jury: "You consider all of this evidence . . . Can you think of a more proper case-- a more proper case in which your verdict assessing death would be more proper?" Record, Vol. V, at 708. That statement made it clear to the jurors

that they had the ultimate responsibility for evaluating the evidence and determining the appropriate sentence.

In his final closing argument, the prosecutor again stressed the gravity and importance of the jury's responsibility when he stated:

We are sorrowful that you do have a duty that you must perform, because you will remember this case, and you'll remember it the rest of your life, and you'll remember whether or not a horrible tragedy occurred and the man that did it sat before you.

. . . .

We must have the protection of the death penalty, and we must have jurors that are strong enough to say, when that kind of a case is laid in front of us, . . . then we must, under the law and under the evidence, under a proper case, we must return the death penalty.

Record, Vol. V, at 728-30.

Furthermore, defense counsel, in his closing argument, responded directly to the prosecutor's comments, thereby underscoring to the jury the full scope of its responsibility:

It seems to me that the situation that we've got here is that [the prosecutor is] trying to tell you that you've got three aggravating factors which could allow you to tell somebody down in McAlester to roll up Robyn Parks' sleeve and inject him with a barbiturate -- a fast-acting paralytic agent -- while strapped in a chair. They could allow you to do that; and under the law which I wrote,⁶ they could. However, nothing in the law says you have to do it. You are the people who are going to determine whether it's done.

I heard [the prosecutor] say if anybody does this, he must suffer death. It's not true. It's not true at all.

Record, Vol. V, at 709.

⁶Apparently the defense counsel had participated in the enactment of Oklahoma's death penalty statute.

The defense counsel then proceeded to discuss the mitigating factors such as the petitioner's age, race and background. Record, Vol. V, at 710. Thereafter, he reemphasized that not all first-degree murders are punishable by the death penalty and that "mandatory death penalties are unconstitutional." Record, Vol. V, at 710-11. He then argued against the alleged aggravating circumstances. Record, Vol. V, at 711-15.

After discussing the aggravating circumstances, defense counsel again emphasized that it was the jury's responsibility to determine the appropriate penalty:

I said, I'm not -- by voting for this bill, I'm not prepared to throw the switch on anybody. The juries are the ones that are going to do that. The law doesn't require it, the

legislature never required it, and I think for a good reason. What they did was, they gave it to the province of 12 people such as you to determine whether a man should live or a man should die, and they gave some guidelines to try to make that decision more rational and less emotional.

.

. . . But again, someone down in McAlester, hired by the state of Oklahoma, is going to have to inject a lethal substance into Robyn Leroy Parks to cause his death, if you do decide, and that responsibility is on each and every one of you.

Record, Vol. V, at 716, 720-21.

Similarly, the judge, in his instructions, emphasized to the jury that it had the responsibility to determine what penalty should be given to the petitioner Parks. The jury was instructed: "It is now your duty to determine the penalty which shall be imposed for this offense." Penalty Instruction No. 3. Unlike Caldwell, in

which the trial court compounded the sense of dilution of responsibility that had been conveyed by the prosecutor to the jury, here the judge's instructions were clear and unequivocal that the sentencing responsibility rested with this jury.

Other decisions of this court and other courts of appeals are instructive on the scope of Caldwell and its applicability to the statements made by the prosecutor in this case. In Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987), this court rejected a Caldwell challenge to statements similar to the ones challenged here. In Dutton, the prosecutor told the jurors that they were "part of the process" and were

"not functioning as individuals." Id. at 596.⁷ This court held that "when taken in context, the statement of the prosecutor was not constitutionally impermissible." Id. at 596-97. Rather, the statement "merely underscored that the jury was part of the whole system of justice." Id. at 597.

In Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 2491, 96 L.Ed.2d 383 (1987), the prosecutor told the jury that it was "not writing the verdict" because the defendant, not the jury, was responsible for the defendant's plight. We concluded in

⁷Those remarks are similar to the statements by the prosecutor in this case that the jurors were "not [themselves] putting Robyn Parks to death" but were just "part of the criminal justice system."

Coleman that the defendant's rights were not violated:

[T]he dangers the Court identified in Caldwell are not present in the remarks made here. This method of argument does not permit the jury to rely on someone else to make the ultimate sentencing decision or otherwise dilute or trivialize the jury's responsibility. Unlike the argument in Caldwell, the argument used here did not suggest to the jury that someone else now has control over the defendant's fate.

Id. at 1240-41 (emphasis in original).

Several other circuits have rejected Caldwell challenges to prosecutorial statements that were more egregious than the ones in this case and while we have no occasion to approve or disapprove of those holdings, they do show how other circuits have read Caldwell. See, e.g., Sawyer v. Butler, 848 F.2d 582, 595 (5th Cir. 1988) (jury was told that

"there will be others who will be behind you to either agree with you or to say you are wrong"), reh'g granted, 1988 U.S. App. Lexis 12690; Stewart v. Dugger, 847 F.2d 1486, 1489-93 (11th Cir. 1988) (judge told jury that "this is one of those cases where the legislature has said that the death penalty is the appropriate penalty" and prosecutor informed the jury of its advisory role); Harich v. Dugger, 844 F.2d 1464, 1472-75 (11th Cir. 1988) (en banc) (advisory jury was told that its sentence was only a recommendation and that the court would make the final decision). Our research reveals that the circuit court decisions that have invalidated sentencing decisions under Caldwell involved prosecutorial remarks that clearly shifted the ultimate

sentencing authority away from the jury. See, e.g., Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (jury was told that its decision was only an "advisory" recommendation and that the sentencing decision was not on its shoulders); Wheat v. Thigpen, 793 F.2d 621, 628-29 (5th Cir. 1986) (jury was told that a death penalty decision would not be final and if the jury made a mistake a reviewing court would send the case back), cert. denied, ___ U.S. ___, 107 S.Ct. 1566, 94 L.Ed.2d 759 (1987).

Upon viewing the prosecutor's statements in context, we conclude that they did not unconstitutionally diminish the jurors' sense of authority and responsibility for the sentencing decision. Although the prosecutor may

have sought to use the challenged remarks to comfort the jury that it was applying standards reflecting societal values, the remarks did not reduce the jury's sense of actual responsibility and authority for determining the appropriate penalty. We read Caldwell as prohibiting only the latter kind of statements, and, accordingly, we hold that the challenged prosecutor's remarks did not violate Caldwell.

II.

ANTI-SYMPATHY INSTRUCTION AND PROSECUTOR'S STATEMENTS REGARDING SYMPATHY

A. The Anti-Sympathy Instruction

Petitioner contends that the anti-sympathy instruction at the penalty phase of his trial violated his eighth amendment rights. The instruction provided, in pertinent part: "You must

avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence."⁸ Petitioner challenges

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The full instruction, Instruction # 9 in the Penalty Trial, provided:

In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the State or the defendant and whether presented in the first proceeding or this sentencing proceeding.

All of the previous instructions given you in the first part of this trial apply where applicable and must be considered along with these additional Instructions; together they contain all the law of any kind to be applied by you in this case, and the rules by which you are to weigh the evidence and determine the facts in issue. You must consider them all together, and not a part of them to the exclusion of the rest.

(continued...)

only the "sympathy" portion of the instruction. He argues that it

⁸(...continued)

You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

The Court has made rulings during the sentencing stage of this trial. In doing so, the Court has not expressed nor intimated in any way the conclusions to be reached by you in this case. The Court specifically has not expressed any opinion as to whether or not any statutory aggravating circumstances exist, or whether or not any mitigating circumstances exist.

You must not use any method of chance in arriving at a verdict but must base it on the judgment of each juror concurring therein.

constitutes constitutional error because it undermined the jury's consideration of mitigating evidence.

In evaluating this alleged constitutional error, we are mindful of the standard of review of jury instructions in the sentencing phase of a capital trial. Initially, a reviewing court should determine how a reasonable juror could construe the instruction. Francis v. Franklin, 471 U.S. 307, 315-16 (1985); California v. Brown, 479 U.S. 538, 541 (1987). If there is a "substantial possibility" that a reasonable juror could construe the instruction in such a way as to make its sentencing decision improper, the court should reverse the sentencing decision. Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 1867, 100 L.Ed.

2d 384 (1988). We conclude in this case, as the Supreme Court did in Mills, that "[t]he possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." 108 S.Ct. at 1870.

The Supreme Court confronted a similar, although not identical, jury instruction in California v. Brown, 479 U.S. 538 (1987). In that case the trial judge instructed the jury that it must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." Id. at 542. As in this case, the defendant challenged the "sympathy" portion of the instruction, arguing that it interfered with the jury's consideration of mitigating

evidence. The Court, in a five to four decision, upheld the instruction, principally relying upon the word "mere" that modified the word "sympathy" in the instruction. The Court stated, "By concentrating on the noun 'sympathy,' respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy." Id. (emphasis in original). The Court concluded that a reasonable juror would "understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." Id.

The anti-sympathy instruction before us is not modified by the word "mere," which the Court in Brown considered

"crucial" to its decision to uphold the instruction. Rather, the instruction in this case commands the jury to disregard "any" influence of sympathy.⁹ Therefore, unlike the instruction in

⁹Judge Anderson's dissent reads the instruction as telling the jury only "to avoid the arbitrary influence of emotions such as sympathy, sentiment, passion, and prejudice." (Emphasis added.) However, that is not the way we read the instruction. It commands the jury to "avoid any influence of sympathy . . . or other arbitrary factor." (Emphasis added.) The word "arbitrary" does not modify "influence." Rather, it modifies "factor," indicating that any "sympathy," even when based on the evidence, is an arbitrary factor which should be completely disregarded by the jury. We do not believe it is "hypertechnical" to examine the elements of an instruction that informs a sentencing jury what it may not consider in making a decision on the death penalty. The word "any" is an important part of the instruction in this case. By giving weight to the adjective used by the instructing court, we are no more technical than the Supreme Court was in Brown when it focused on the word "mere."

Brown, this all-inclusive anti-sympathy instruction carries with it the danger of leading the jury to ignore sympathy that is based on the mitigating evidence. Consequently, it cannot receive the saving interpretation given in Brown that the jury should exclude only "the sort of sympathy that would be totally divorced from the evidence." The Court in Brown, by stressing that the instruction there reasonably could be construed as precluding only "extraneous emotional factors" that were "totally divorced from the evidence," id., implicitly suggested that sympathy that is based on the evidence is a valid consideration in

sentencing that cannot constitutionally be precluded.¹⁰

Besides emphasizing the word "mere," the Court in Brown also stated that it was "highly unlikely" that a juror would single out the word "sympathy" in that instruction, which precluded the jury from considering sentiment, conjecture, passion, prejudice, public opinion or public feeling in addition to sympathy. Id. at 542-43. The Court reasoned that a rational juror would read the instruction as a whole and conclude that it was a general command

¹⁰In fact, the State in Brown acknowledged that the jury may consider sympathy for the defendant that is related to the evidence. The state merely argued that "untethered sympathy" that was unrelated to the circumstances of the offense or the defendant should not be considered. Brown, 479 U.S. at 548 (Brennan, J., dissenting).

to confine the juror's deliberation to "considerations arising from the evidence presented." Id. at 543.¹¹ However plausible such an interpretation may be for the phrase "mere sympathy," we do not think it can be given to the phrase "any influence of sympathy" which, by its inclusive terms, must include sympathy "arising from the evidence presented" as well as sympathy unconnected to the evidence.

In any event, we do not believe that the inclusion of the word sympathy in a list of obviously improper factors reduced the unconstitutional effect of the instruction in this case. In fact,

¹¹ We do not read these statements to be central to the Court's reasoning. The Court was careful to state that it was the existence of the adjective "mere" that was "the crucial fact" underlying its decision. 479 U.S. at 542.

it is likely that including the word sympathy with factors such as prejudice only served to denigrate it and to underscore its impermissibility. That conclusion is buttressed by the phrase "or any other arbitrary factor" at the end of the sentence, which suggests that sympathy is an arbitrary factor which should not be relied upon. Further, although the word "sympathy" was buried in the middle of seven factors in Brown, in this case it was first on the list of only four impermissible factors and it was preceded by the adjective "any." Therefore, it is more likely in this case that a juror would notice and be affected by the anti-sympathy portion of the instruction.

Four justices in Brown dissented. 479 U.S. at 547-63. Because those justices argued in Brown that a "mere sympathy" instruction was unconstitutional, we believe that, a fortiori, they would find an absolute anti-sympathy instruction to be improper.

Justice O'Connor, in a separate concurring opinion, provided the fifth vote for upholding the "mere sympathy" instruction in Brown. In her opinion, however, she expressed concern about the instruction, and she observed that a danger with "attempts to remove emotion from capital sentencing" is that such attempts may mislead jurors "into believing that mitigating evidence about a defendant's background or character also must be ignored."

Brown, 479 U.S. at 545-46 (O'Connor, J., concurring). It is that concern that we now address.

The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also, Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also, Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1964, 95 L.Ed.2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an

individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual

defendant mercy violates the Constitution." Id. at 199.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular

offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of a capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the

sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine the

individuality of the defendant" because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the

character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all been affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and

sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion" is a "deep feeling for and understanding of misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id. (emphasis added).

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a

synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." Therefore, the instruction that absolutely precluded the jury from considering any sympathy for Robyn Parks improperly undermined the jury's ability to consider fully petitioner's mitigating evidence. Furthermore, if a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's

father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.

Petitioner's counsel, in his closing argument, then relied on this testimony

to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723. We find that the anti-sympathy instruction created an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.

Once we have determined that the challenged jury instruction is constitutionally defective, we then look to the full set of instructions as

a whole "to see if the entire charge delivered a correct interpretation of the law." Brown, 479 U.S. at 541. Our review of other relevant instructions from the penalty phase of the trial reveals that they did not remedy the unconstitutional effect of the anti-sympathy instruction.

The only instruction which could have conceivably remedied the anti-sympathy instruction is Instruction No. 6, which explained the jury's duty regarding mitigating circumstances. The instruction explained to the jury that it was to consider certain enumerated mitigating circumstances such as lack of prior criminal activity, duress, and the age of the petitioner, along with "any other or additional mitigating circumstances, if

any, that you may find from the evidence to exist in this case." It also advised them that "[w]hat facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine."

Although the jury was instructed that it had the duty to consider all relevant mitigating evidence, it was also commanded to "avoid any influence of sympathy" when considering that evidence. Penalty Instruction No. 9. As we discussed above, . sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character. Thus, at best, the jury received conflicting instructions. Although it is possible that the jury could have read the

instructions in such a way as to override the absolute anti-sympathy instruction, it is equally possible that the jury felt constrained in its ability to consider the mitigating evidence because of the absolute bar to its ability to consider sympathy. As the Supreme Court stated in Francis v. Franklin, 471 U.S. 307, 322 (1985), "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." Because we cannot "rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground," Mills, 108 S. Ct.

at 1867, we must remand for resentencing.

Respondent argues that the jury was aware of its responsibility to consider and weigh both the aggravating and mitigating evidence. Respondent points out that the prosecutor repeatedly reminded the jurors of this duty. Indeed, during his first closing argument in the penalty phase of the trial, the prosecutor stated:

Now before you would be authorized to even think about giving the death penalty, you must find that one of the aggravating circumstances existed.

.

. . . Now once you've found at least one, then you must go, under the law, over to the mitigating.

.

And, now the court also tells you, you can consider

anything else that you want to, to mitigate the penalty of death and the term of life. You can consider anything you want to in addition to what he's told you . . . "and determine whether one or more of them apply to all the evidence, facts and circumstances of this case." In other words, whether or not you feel like that these mitigating circumstances are so strong in favor of the Defendant that it's just going to eliminate and do away with the aggravating circumstances.

Record, vol. V, at 696-704.

Respondent argues that these statements eliminated any unconstitutional effect of the anti-sympathy instruction. We disagree. First, a prosecutor's statements are not sufficiently authoritative in the minds of jurors to override an unconstitutional instruction from the judge. Second, although the prosecutor told the jury to consider mitigating evidence, he also told them

not to consider it in the most natural and significant way that they could do so -- that is, with sympathy. Thus, at best, the prosecutor gave the jurors conflicting signals which could have confused them and interfered with their consideration of the mitigating evidence. Third, the prosecutor's statements, taken as a whole, served only to exacerbate the error of the antisympathy instruction rather than to ameliorate that error. See "B. The Prosecutor's Remarks Regarding Sympathy," *infra*.

Respondent also argues that sympathy is not a constitutionally protected mitigating factor. That argument misconstrues the issue. The issue is not whether unbridled sympathy itself is a proper mitigating factor. Rather,

the issue is whether an absolute anti-sympathy instruction presents an impermissible danger of interfering with the jury's consideration of proper mitigating evidence. We hold that it does.¹² The Supreme Court has made it clear that such a risk is "unacceptable and incompatible with the

¹²We recognize that our holding is at odds with the recent decision by the Fifth Circuit in Byrne v. Butler, 847 F.2d 1135 (5th Cir. 1988). That court affirmed and adopted a district court's holding that a general anti-sympathy instruction did not violate a defendant's constitutional rights. The district court stated that the qualifier "mere," which modified the word "sympathy" in California v. Brown, was not needed to avoid a constitutional violation. 847 F.2d at 1139. We believe that the district court and the Fifth Circuit treated the Supreme Court's emphasis in Brown of the word "mere" too lightly. Our reading of Brown indicates to us that the Supreme Court recognized that sympathy grounded upon mitigating evidence may be considered by the jury. The Fifth Circuit's holding would eliminate such consideration.

commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S. at 605.

Respondent also contends that the instruction is properly aimed at removing emotion and thus arbitrariness from the sentencing decision. Although we agree that untethered emotion should not be the basis of a sentencing decision, see Gregg v. Georgia, 428 U.S. 153, 189 (1976), we hold that an instruction that directs the jury to disregard any influence of sympathy, including sympathy for the defendant based on the mitigating evidence, sweeps too broadly.¹³

¹³Judge Anderson's dissent suggests that we are "slant[ing] toward a constitutional right to an emotional jury." The dissent confuses our support for Robyn Parks' right to appeal to the sentencing jury's compassion, mercy, and sympathy based on the evidence, which is well grounded in the Supreme (continued...)

Additionally, respondent asserts that the jury should not be allowed to consider sympathy for the petitioner because the prosecutor is precluded from introducing a victim impact statement which would allow the prosecutor to use sympathy for the victim as an aid in securing the death penalty. See Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). In Booth the Supreme Court invalidated a Maryland statute that required the introduction of a victim impact statement at the sentencing stage of a capital murder trial, holding that the statute violated the eighth amendment. We reject

13 (...continued)

Court's jurisprudence, with a support for untethered emotion, which we do not intend by our opinion.

respondent's argument that Booth stands for the proposition that all sympathy must be eliminated from the jury's decisionmaking. Instead, we read Booth as holding only that the information in a victim impact statement, as distinguished from the background of the defendant, is irrelevant to the issues to be considered at the penalty phase of a capital case and that the potential for passion and prejudice from those statements is such that they may not be introduced. By contrast, the Supreme Court has made it clear many times that the defendant is entitled to present evidence of his character and background at the sentencing phase of his capital trial. Compare Eddings, suora, with Booth, supra.

B. The Prosecutor's Remarks Regarding Sympathy

Besides the anti-sympathy instruction, petitioner claims that the prosecutor's remarks regarding sympathy were improper and added to the constitutional violation. Because we find that the anti-sympathy instruction alone violated petitioner's constitutional rights, we need not reach the prosecutor's statements to reverse the penalty decision. Nevertheless, we do find the prosecutor's statements illustrative of the risk that the trial court's anti-sympathy instruction created — a risk that the jury will rely on such an instruction to disregard proper mitigating evidence.

Petitioner, during the penalty phase of his trial, introduced testimony from

his father that addressed factors in the petitioner's childhood that were designed to explain to the jury why he might have acted as he did, and to evoke some sympathy and understanding for the petitioner as an individual human being. There is no question that introduction of that evidence was proper. However, long before that evidence was ever introduced the prosecutor had begun to lay the foundation for his argument that it should be disregarded. During voir dire, the prosecutor stated to the jury:

Of course the court will instruct you that you should not allow sympathy, sentiment or prejudice to enter into your deliberations. And frankly, that's just as cold-blooded as you can put it.

. . . [Y]ou can be as sympathetic as you want to or you

can be as prejudiced as you want to be, but you can't do it and sit on this jury. So, that's just a real simple way that Judge Cannon put it to you.

You cannot allow your sympathy, sentiment or prejudice to influence you in this case and sit on this jury. And now is the time for us to find out if you will eliminate any sympathy, sentiment or prejudice in this case. Will all of you do that?

Record, vol. I, at 86-87.

After the petitioner put on his mitigating evidence, the prosecutor, in his closing argument during the penalty phase of the trial, argued to the jury that the mitigating evidence and defense counsel's summation of such evidence was nothing more than an appeal to sympathy and accordingly should be disregarded. The prosecutor stated:

His [the defense counsel's] closing arguments are really a pitch to you for sympathy

sympathy, or sentiment or prejudice; and you told me in voir dire you wouldn't do that.

Well, it's just cold turkey. He either did it or he didn't. He either deserves the death penalty or he doesn't, you know. You leave the sympathy, and the sentiment and prejudice part out of it.

Record, vol. V, at 725-26.

Thus, the prosecutor relied on the anti-sympathy instruction to overcome the defense counsel's arguments regarding mitigation and mercy.¹⁴ The prosecutor's use of the instruction demonstrates how a general anti-sympathy instruction may be used to

¹⁴At least one court of appeals has held that similar statements by a prosecutor are unconstitutional. See Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) (prosecutor's anti-mercy statements were improper; mercy is one of the jury's "most central sentencing considerations, the one most likely to tilt the decision in favor of life"), cert. denied, 478 U.S. 1020 (1986).

reduce improperly the jury's consideration of mitigating circumstances.

Because we find that an instruction that absolutely precludes any consideration of sympathy creates an impermissible risk that a reasonable juror might disregard mitigating evidence, we hold that the general anti-sympathy instruction in this case violated petitioner's eighth amendment rights. Although we affirm the district court's denial of the writ of habeas corpus, we hold that petitioner's death sentence is invalid and must be vacated, and we enjoin petitioner's execution under this invalid sentence.¹⁵ Accordingly, we

¹⁵The federal habeas statute empowers the federal courts to dispose (continued...)

reverse the district court to the extent that it sustained the death penalty and we remand for further proceedings consistent with this opinion.¹⁶

¹⁵(...continued)
of the matter "as law and justice require." 28 U.S.C. § 2243; Chaney v. Brown, 730 F.2d 1334, 1358 (10th Cir.), cert. denied, 469 U.S. 1090 (1984).

¹⁶Before 1985, Oklahoma courts held that they lacked the authority to order a resentencing proceeding before a new jury because 21 Okla. Stat. § 701.10 (1981) mandated that a capital sentencing proceeding be conducted before the same jury that determined the defendant's guilt. See, e.g., Chaney v. Brown, 699 P.2d 159 (Okla. Crim. App. 1985); Johnson v. State, 665 P.2d 815, 826-27 (Okla. Crim. App. 1982). Therefore, when errors in sentencing in capital cases were found, death sentences would be modified to life imprisonment. Effective July 16, 1985, the Oklahoma Legislature amended section 701.13(E) to authorize remanding a capital case for resentencing. See 21 Okla. Stat. Ann. § 701.13(E) (West Supp. 1988). We are aware that the Oklahoma Court of Criminal Appeals has held that (continued...)

REVERSED AND REMANDED.

10TH CIRCUIT OPINION EN BANC

OPINION OF CHIEF JUDGE
HOLLOWAY, WITH WHOM MCKAY,
SEYMOUR, CIRCUIT JUDGES,
JOIN, CONCURRING AND
DISSENTING

16(...continued)

retroactive application of the amended statute would be unconstitutional under the Federal and Oklahoma constitutions, Dutton v. Dixon, 757 P.2d 376 (Okla. Crim. App. 1988), and that the relevant dates for this ex post facto problem are the date the offense was committed and the date the statute became effective. Bromley v. State, 757 P.2d 382, 388 (Okla. Crim. App. 1988). However, the manner in which the State of Oklahoma chooses to resentence petitioner is not now before us and we express no view on the issue.

HOLLOWAY, Chief Judge, with whom MCKAY and SEYMOUR, Circuit Judges, join, concurring and dissenting: No. 86-1400

I concur fully in the persuasive analysis in Judge Ebel's opinion with respect to Part II on the anti-sympathy instruction, and in the disposition in his opinion holding unconstitutional the death penalty in this case. I respectfully dissent from the conclusion and analysis in Part I of Judge Ebel's opinion concerning the Caldwell issue. For this reason I join in the opinion of Judge McKay and agree fully with his view that there was a Caldwell violation here under the Supreme Court's standard expressed there that "we cannot say that this effort [minimizing the sentencing jury's responsibility] had no effect on

the sentencing decision . . ." (quoting Caldwell, 472 U.S. at 341).

Judge McKay has convincingly explained his conclusion that there was a Caldwell violation requiring invalidation of this death penalty. In addition to his forceful reasoning, I note that the concerns of Caldwell apply in the circumstances of this trial under Oklahoma criminal procedure with special force. The prosecutor's arguments under the Oklahoma procedure followed the instructions to the jury at the penalty phase. Under 22 O.S.A. § 831 (5) and (6), instructions are given to the jury before the argument by counsel; then counsel for the State commences, defense counsel then argues, and counsel for the State concludes the argument to the jury. When the

arguments are concluded, if the court is of the opinion that the jury might be misled by the arguments of counsel, the judge may further instruct the jury to prevent such misunderstanding. 22 O.S.A. § 831 (6).

Here the procedure outlined above was followed as to the sequence of instructions and subsequent arguments, but the trial court did not elect to give any further instructions on the law to avoid any misleading. There was a supplemental instruction in response to a question about the verdict form, but there was none concerning the jury's responsibility on the life-or-death decision. The record shows no objection or request by defense counsel for such an instruction; nevertheless the damaging effect of the arguments on

the jury's perception of its responsibility was fundamental and cannot be dismissed. See Caldwell, 472 U.S. at 334 n.4 (citing Hawes v. State, 240 Ga. 327, 333; 240 S.E. 2d 833, 839 (1977) (setting aside death sentence in spite of counsel's failure to object to prosecutor's argument)).

The prejudicial arguments of the prosecutor here to the jury on its function followed all of the trial judge's instructions on the jury's responsibility in deciding whether to impose the death penalty.¹ The lack

¹These arguments included the statements that the jurors had become "a part of the criminal justice system that says when anyone does this, that he must suffer death . . . [O]nce your verdict comes back in, the law takes over. The law does all of these things. . . . You're just part of the criminal-justice system that says when this type of [sic] thing happens, that
(continued...)

of any corrective instruction to the jurors on their responsibility is a factor of special concern. The importance of such corrective instructions after jury dilution remarks has been emphasized by two courts of appeals in post-Caldwell decisions. See Harich v. Wainwright, 813 F.2d 1082, 1095, (11th Cir. 1987); Tucker v. Kemp, 802 F.2d 1293, 1296-97 (11th Cir. 1986), cert. denied; 480 U.S. 911 (1987); Celestine v. Butler, 823 F.2d 74, 78-79 (5th Cir.), cert. denied; 108 S. Ct. 6 (1987); see also

¹(...continued)

whoever does such a horrible, atrocious thing must suffer death."

The prosecutor further stated: "Now, that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know." (Record Vol. 6 at 707-08.).

Donnelly v. DeCristoforo, 416 U.S. 637, 641, 644 (1974) (corrective charge was given after improper prosecutorial argument).

Accordingly, I join in the view of Judge McKay that there was a Caldwell violation which itself requires invalidation of this death penalty, while agreeing fully with Judge Ebel's opinion that there was a violation of California v. Brown and his disposition of this habeas appeal.

10TH CIRCUIT OPINION EN BANC

OPINION OF MCKAY, CIRCUIT
JUDGE, CONCURRING IN PART
IN WHICH HOLLOWAY, CHIEF
JUDGE, AND SEYMOUR,
CIRCUIT JUDGE, JOIN

No. 86-1400 - PARKS v. BROWN

MCKAY, Circuit Judge, concurring in part and dissenting in part, in which HOLLOWAY, Chief Judge, and SEYMOUR, Circuit Judge, join:

While I concur in part II of the majority's opinion, the decision on the jury responsibility issue raised in part I compels me to dissent in this death penalty case.

The murder committed by Robyn Parks was, as all murders are, a personal tragedy for the victim's family and an affront to society's moral sensibilities. At common law, every convicted murderer was sentenced to death. Throughout the development of modern death penalty jurisprudence, however, the Supreme Court has made clear that capital punishment is constitutionally limited to those rare murders involving

heinous, outrageous, or gruesome killings.

The Supreme Court rejected the notion that our "standards of decency had evolved to the point where capital punishment no longer could be tolerated," Gregg v. Georgia, 428 U.S. 153, 179 (1976), but at the same time recognized that the capital sentencing process must be tailored in order to avoid arbitrary and capricious imposition of the death penalty based on irrelevant biases and prejudices. In order to resolve this conflict, the Supreme Court has limited imposition of the death penalty by narrowing the class of murders to which the penalty applies and by vesting the jury with carefully guided discretion in the sentencing phase of a capital murder

trial. See Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982), and Gregg, 428 U.S. at 176-79.

The Supreme Court's severe narrowing of cases in which the death penalty meets eighth amendment standards reflects society's evolving standards of decency and "the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." Gregg, 428 U.S. at 182. The decision to impose the death penalty in a particular murder case properly turns on such issues as the depravity of the murder (e.g., whether the defendant tortured his victim or inflicted multiple or hideous wounds) and the demonstrated violent propensities of the defendant. These are the factors which differentiate

those "routine murder case[s]," Jackson v. Virginia, 443 U.S. 307, 328 (1979) (Stevens, J., concurring) that cannot justify the imposition of the death penalty from those far fewer murder cases that do.

I.

The critical standard of review in death penalty cases is the Supreme Court's most recent pronouncement on the subject in Mills v. Maryland, ___ U.S. ___, 108 S. Ct. 1860, 1870 (1988):

The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task

improperly certainly is great enough to require resentencing.
(emphasis added)

Stated in the context of this case, in order to sustain the death penalty we must determine that the prosecutor's effort to reduce the jury's sense of responsibility had "no effect on the sentencing decision." Caldwell v. Mississippi, 472 U.S. 320, 341 (1985). In this case, Mr. Parks attempted to purchase gasoline with a stolen credit card and shot the victim once in the chest when he discovered the victim copying his license plate number. There was no evidence of torture, multiple wounds, or premeditation on the part of Mr. Parks. His only prior conviction was as a juvenile involved

in a schoolyard scuffle. Under the acts of this ordinary murder case,¹ the jury's imposition of the death penalty strongly suggests that it "conducted its task improperly" and its verdict may have been a product of the jurors' misapprehension of its proper role in the sentencing process.

When the jury addressed aggravating circumstances, it did not find that this murder was "especially heinous, atrocious or cruel." Maj. op. at 3, fn. 1. However, it did find that the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution," 21 Okla.Stat. §701.12.

¹ See my dissent in *Parks v. Brown*, 840 F.2d 1496 (10th Cir. 1987), for a discussion of the distinction between an ordinary murder and one which is appropriately considered for capital punishment.

Certainly that circumstance alone does not clearly settle this murder into one of the "extreme cases" envisioned by Gregg. In my mind, even if this aggravating circumstance, standing alone, is constitutionally sufficient to sweep an ordinary murder like this one into the class of extreme cases appropriate for capital punishment, the jury's decision to impose the death penalty in this case warrants the special scrutiny dictated by Mills. Special scrutiny is necessary in order to ensure that the jury was not improperly guided in its decision-making process. The imposition of the death penalty in this case is disquieting because it at least appears to be a case in which the death penalty is inappropriate under the clear

dichotomy drawn by the Supreme Court between the great majority of murders and those in which capital punishment is constitutionally permissible.

II.

In death penalty cases, the Court should exercise the greatest caution when applying principles of law which affect the delicate balance between jury guidance and discretion in the capital sentencing process. A prosecutor's remarks regarding jury responsibility and the remarks and instructions of a trial court, or lack thereof, in response to her remarks can be critical in the jury's capital sentencing determination. Therefore, the prosecutor's remarks, if impermissible, increase the likelihood that

the jury's verdict rests upon improper grounds.

In general, many issues which arise in a jury trial are well within the competence of jurors: for example, weighing evidence, discounting counsel's remarks if she overargues her case, observing the demeanor and truthfulness of witnesses, distinguishing between acceptable and unacceptable hearsay, and ultimately comprehending the simplicity or complexity of a case before them. Where capital sentencing is concerned, however,

[s]ince the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the [aggravating and mitigating] information they are given. . . . It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Gregg, 428 U.S. at 192-93.

The problem of juror inexperience is particularly acute in matters bearing upon the procedural allocation of functions and responsibilities between the court and the jury.² It is in these matters that the jurors are most likely to look to the court for guidance and to rely on what the prosecutor tells them or what the court tells or fails to tell them. Direction by the state in the person of the prosecutor, and instructions from the court, or lack thereof, regarding jury responsibility in sentencing are espe-

² For instance, traditionally sentencing and the disposition of offenders have been functions of the trial court. In these matters, the court has considerably more experience than members of the jury.

cially likely to influence the jury's decision-making process.

III.

Under the Mills standard, the prosecutor's remarks in this case, which were not corrected contemporaneously by the court, violated the principles articulated in Caldwell, 472 U.S. 320. The Caldwell court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29. This delegation of a jury's sentencing responsibility "presents an intolerable

danger of bias toward a death sentence." Id. at 331.

The Supreme Court recently interpreted Caldwell to prohibit those comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986) (emphasis added). Indeed, the Court rejected automatic death penalty statutes, see Woodson v. North Carolina, 428 U.S. 280 (1976), in order to ensure that jurors remain conscious of the awesome responsibility involved when they determine whether a convicted murderer should live or die.

In the concluding paragraph of Part I, the majority declares that the prosecutor's remarks may have been intended "to comfort the jury that it was applying standards reflecting societal values, the remarks did not reduce the jury's sense of actual responsibility and authority for determining the appropriate penalty." Maj. op. at 14. The proper focus, of course, is whether the comments, whatever their intent, "may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers." California v. Ramos, 463 U.S. 992, 1011 (1983) (emphasis added). Clearly, a jury's moral responsibility in a capital murder case

is the sine qua non of its sentencing decision. I cannot see how this attempt "to comfort them" had no effect on their sense of moral responsibility. It was a blatant attempt to distract them from it. If it was intended to comfort them, it was by dissuading them from the moral burden the law imposes on them. We cannot say, as the majority says, that the "remarks did not reduce the jury's sense of actual responsibility," maj. op. at 14. We don't know that. We are required instead to determine that there is no possibility that the remarks reduced this sense of moral responsibility. One of the major themes persistent in Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), and their progeny

is that the jury's exercise of discretion, although limited by legislative guidelines, is necessary for a proper sentencing determination. See Woodson, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). A jury properly exercising its discretion in capital sentencing "maintain[s] a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968), quoting Trop v. Dulles, 356 U.S. 86, 101 (1958).

In the sentencing process, the determination of the number and seriousness of aggravating circumstances is merely a guideline for the jurors, a benchmark for considering the death penalty. If the jury finds that aggravating circumstances outweigh mitigating circumstances, imposition of the death penalty is constitutionally permissible; however, under Oklahoma law, the jury may still exercise its discretion by refusing to impose the death penalty. Parks v. State, 651 P.2d 686, 694 (Okla. 1982), cert. denied, 459 U.S. 1155 (1983). Under this sentencing construct, the prosecutor's remarks are singularly invidious because his words create a mandatory sentencing scheme which attempts to strip the jury of the very

discretion it may fully exercise up to the final moment when the verdict is decided.

Near the close of his argument in chief, the prosecutor in this case made the following remarks:

And then you may say, well, you know, yeah, I still mean it, I could, without doing violence to my conscience if this was a proper case; but, you know, I really don't want it on my hands that I had anything to do with anybody dying. So for that reason, although this is a proper case, I don't want to assess the death penalty because I just don't want to have to think about that. I don't want it on my conscience.

Well, I don't think it's on Robyn Parks' conscience that he took an innocent person's life away; and I don't believe in observing him throughout this trial and his testimony and listening to his voice on the tapes--I don't feel like there's the least bit of remorse in him over what he did. But, you know, as you as jurors, you really, in assessing the death penalty, you're not yourself

putting Robyn Parks to death. You just have become a part of the criminal-justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict--once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal-justice system that says when this type of type of [sic] thing happens, that whoever does such a horrible, atrocious thing must suffer death.

Now, that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know.

Record, vol. 6, at 707-08.

Such an argument was designed to do precisely what Caldwell specifically prohibits: allow the jurors to minimize their sense of personal responsibility for imposing the death sentence. By implying that the law

affirmatively mandated the death penalty in this case, the prosecutor allowed the jurors to feel as if their hands were tied. He allowed them to feel as if they were not choosing to impose the death penalty, the law required it. In essence, he told the jurors that they were not responsible for sentencing Robyn Parks to death; the ephemeral "criminal justice system" was.

Portions of the prosecutor's argument merit repeating for illustration:

You just have become a part of the criminal-justice system that says when anyone does this, that he must suffer death. . . . [O]nce your verdict comes back in, the law takes over. The law does all of these things. . . . You're just part of the criminal-justice system that says when this type of type of [sic] thing happens, that whoever does such a

horrible, atrocious thing must suffer death.

Record, vol. 6, at 707 (emphasis added). The prosecutor's remarks in this case are clearly improper because they diffuse the jurors' sense of responsibility for the death sentence by intimating that the jury is performing a dispassionate, mechanical, and ministerial, rather than discretionary function by "just following the law, and what the law says." Record, vol. 6, at 708.

The majority opinion finds the statements made in this case similar to those we found constitutional in both Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc), and Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986). Maj. op. at 12. I strongly disagree and set out in the margin the

challenged statements made in those cases for purposes of comparison.³

³The challenged statements in Dutton were as follows:

First of all, [Defense Counsel] argues that the final decision is yours, and of course, to some degree it is. But you are, as I am, as Judge Theus is, as all the courts are, part of the process. We are not functioning as individuals. I am not here as Andy Coats. I am here as the District Attorney.

And you are not here in your individual capacities. You are here as the jury. And Judge Theus is not our good friend, Harold, off the Bench. He is his Honor, Judge Harold Theus, when he is in this Courtroom.

And we are all part of the law and it is the law that makes us work. So it has to be in that attitude, in that frame of mind, that you approach the problem.

Dutton, 812 F.2d at 596.

The challenged statements in Coleman were as follows:

In closing I say to you that they
(continued...)

The prosecutor in Dutton attempted to define the juror's roles functionally, instead of individually, but did not minimize the juror's sense of responsibility within those roles. As for the remarks in. Coleman, the

³(...continued)

try to put the responsibility on you, like it's all your fault. To a certain extent--I don't mean to imply, I don't mean to imply that it's put on you like it's your fault if you do something in this case. I don't mean to imply that necessarily, but let me make it real clear that you're not writing the verdict in this case. Don't--don't be mistaken into believing that it's your responsibility that this happened, that you're, you're writing the verdict. I, I say to you, this man wrote the verdict on February 9th, and all those days after when he got out of jail and went on [sic] spree of knifing and kidnapping and killing. He wrote the verdict. This man. He wrote it in blood over and over.

Coleman, 802 F.2d at 1240.

prosecutor stressed that the defendant was responsible for his own plight but did not intimate that the awesome responsibility of imposing the death sentence did not rest solely with the jury. The statements made in the present case are much more troublesome because they are squarely directed at attempting to ameliorate any sense of accountability for the decision that this man must be executed.

Moreover, we found it critical in both Dutton and Coleman that the prosecutor made subsequent remarks stressing the importance and exclusivity of the jury's role in the sentencing determination. "It is clear that, when taken in context, the statement of the prosecutor was not constitutionally impermissible. . . .

Indeed, the tenor of the remainder of the closing was that the crucial determination of punishment was the sole function of the jury." Dutton, 812 F.2d at 596-97 (emphasis added). In Coleman, we quoted the prosecutor's subsequent remarks at length. See Coleman, 802 F.2d at 1241. We found that "viewing [the Coleman] argument in context, it is evident that the prosecutor had no intention of diminishing the jury's sense of responsibility." Id. (emphasis added). In the present case, the prosecutor made no additional remarks that could have neutralized his impermissible comments. Essentially, he closed his argument-in-chief with the unconstitutional statements.

In addition, the court's instructions, although a correct statement of the law regarding juror responsibility, were buried in conventional boilerplate jury responsibility language. Moreover, the court in this case did not contemporaneously, or subsequently, effectively neutralize the prosecutor's impermissible remarks. As Chief Judge Holloway has so cogently noted in his concurring and dissenting opinion in which I fully concur, under Oklahoma procedure the trial court had a duty to do so after the prosecutor's remarks.

The Supreme Court's concluding statement in Caldwell is particularly applicable here:

This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the

gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

Caldwell, 472 U.S. at 341 (emphasis added). The jury's verdict in this case is unreliable because it is possible that improper remarks have influenced its determination. Because I cannot say that the prosecutor's efforts to reduce the jury's sense of responsibility in this case had no effect on the jury's conducting of its task, I join in the majority's mandate for this reason as well as for the reason relied on by the majority.

10TH CIRCUIT OPINION EN BANC

OPINION OF JUDGE ANDERSON,
CONCURRING AND DISSENTING
IN PART, WITH WHOM TACHA,
BALDOCK AND BRORBY, CIRCUIT
JUDGES, JOIN

86-1400 - Robyn Leroy Parks v. John N. Brown, etc., et al.

ANDERSON, Circuit Judge, Concurring and Dissenting in part, with whom TACHA, BALDOCK, and BRORBY, Circuit Judges, join:

I concur in Part I of the majority opinion, but I disagree with the majority's holding on the instruction which tells the jury to avoid the arbitrary influence of emotions such as sympathy, sentiment, passion and prejudice.

I.

The instruction in question, a general one following a series of more specific instructions, reads:

"In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the State or the defendant and whether presented in the first

proceeding or this sentencing proceeding.

"All of the previous instructions given you in the first part of this trial apply where applicable and must be considered along with these additional Instructions; together they contain all the law of any kind to be applied by you in this case, and the rules by which you are to weigh the evidence and determine the facts in issue. You must consider them all together, and not a part of them to the exclusion of the rest.

"You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

"The Court has made rulings during the sentencing stage of this trial. In doing so, the Court has not expressed nor intimated in any way the conclusions to be reached by you in this case. The Court specifically has has (sic) not

expressed any opinion as to whether or not any statutory aggravating circumstances exist, or whether or not any mitigating circumstances exist.

"You must not use any method of chance in arriving at a verdict but must base it on the judgment of each juror concurring therein.

"You have already elected a Foreman. Your verdict must be unanimous. Proper forms of verdict will be furnished you from which you shall choose one to express your decision. When you have reached a verdict, all of you in a body must return it into open Court.

"This law provides that you should now listen to and consider the further argument of counsel."

R. Vol. II, Instruction No. 9
(emphasis supplied).

The majority opinion proceeds on the premise that the jury focused on the word "any" in the sentence about passions, ignoring the words and sense of the sentence as a whole. Upon that very slight and hypertechnical premise

the majority constructs large conclusions: that the instruction is unconstitutional on its face because it commands the jurors to denigrate mitigating circumstances evidence; that this general instruction overrides or otherwise nullifies the specific instructions on mitigating circumstances, as well as other specific instructions; and that California v. Brown, 107 S. Ct. 837 (1987), does not apply since the instruction there used the word "mere" preceding the enumerated emotions.

The majority misconceives the sense of the instruction: A reasonable juror would not stop part way through the sentence in question (at "any . . . sympathy") as the majority presumes. The sentence by its express terms

refers to arbitrary factors ("any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor"). Thus, it sensibly cautions the jury against imposing sentence simply on the basis of arbitrary emotions. That is not qualitatively different from the meaning imparted by the instructions in Brown. In Brown the jury was directed not to divorce its considerations from the evidence and render an essentially whimsical decision based on mere sympathy. Here, the same directive is couched in terms of any arbitrary sympathy.

The context in which the sentence appears makes that clear. The next sentence in the instruction stresses impartiality. The preceding sentences state flatly that the jurors alone are

the judges of the facts and that "the importance and worth of the evidence is for you to determine." Earlier, the jury was specifically instructed that it was not limited in any way in its consideration of mitigating circumstances:

"You are further instructed that mitigating circumstances, if any, must also be considered by you, and although they are not specifically enumerated in the statutes of this State, the general law of Oklahoma and the United States sets up certain minimum mitigating circumstances for you to follow as guidelines in determining which sentence should be imposed in this case. You must consider all the following minimum mitigating circumstances and determine whether any one or more of them apply to all of the evidence, facts and circumstances of this case. You are not limited in your consideration to the minimum mitigating circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts

or evidence that may constitute an additional mitigating circumstance is for the jury to determine.

"The minimum mitigating circumstances are:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
4. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;
5. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;
6. The defendant acted under duress or under the

domination of another person;

7. At the time of the murder the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease or intoxication;
8. The age of the defendant at the time of the crime."

R. Vol. II, Instruction No. 6 (emphasis supplied).

Furthermore, all the instructions came after a sentencing proceeding in which the defendant's father testified about the defendant's character, friendly personality, and childhood circumstances, including the facts that the defendant was a product of a broken home and his father had served time in prison. And, the prosecution devoted its attention to the same sort of

individualized evidence regarding Park's childhood, character and record, as well as the circumstances of the crime.

Under the circumstances, the reasoning in Brown to the effect that it is constitutional to instruct a jury not to be arbitrarily emotional applies directly to this case:

"Even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase. While strained in the abstract, respondent's interpretation is simply untenable when viewed in light of the surrounding circumstances. This instruction was given at the end of the penalty phase, only after respondent had produced 13 witnesses in his favor. Yet respondent's interpretation would have these two words transform three days of favorable testimony into a virtual charade.

We think a reasonable juror would reject that interpretation, and instead understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.

"We also think it highly unlikely that any reasonable juror would almost perversely single out the word 'sympathy' from the other nouns which accompany it in the instruction: conjecture, passion, prejudice, public opinion, and public feeling. Reading the instruction as a whole, as we must, it is no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty. The doctrine of noscitur a sociis is based on common sense, and a rational juror could hardly hear this instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating.

"An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the

trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' Woodson, supra, 428 U.S., at 305, 96 S.Ct., at 2991. Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process. See Roberts v. Louisiana, 428 U.S. 325, 335, and n. 11, 96 S.Ct. 3001, 3007, and n.11, 49 L.Ed.2d 974 (1976) (opinion of Stewart, POWELL and STEVENS, JJ.)."

California v. Brown, 107 S.Ct. at 840

(emphasis supplied).

II.

In her concurring opinion in Brown, Justice O'Connor identified a tension between two central principles of Supreme Court Eighth Amendment jurisprudence, stating:

"In Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976), we concluded that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' In capital sentencing therefore, discretion must be 'controlled by clear and objective standards so as to produce nondiscriminatory application.'" Id., at 198, 96 S.Ct., at 2936 (quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)). See also Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.) (State must provide 'specific and detailed guidance' to the

sentencing body). On the other hand, this Court has also held that a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion).

California v. Brown, 107 S.Ct. at 841.

The tension described by Justice O'Connor, and considered by her in Brown, is reduced in this case because the instructions on mitigating evidence are much stronger. Under these instructions the jury was clearly informed that the listed mitigating circumstances were the minimum to be considered, and that the jury was entitled to consider any other or additional mitigating circumstances it found from the evidence to exist. The

instructions went on to emphasize that "[w]hat facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine."¹ It is simply not reasonable to assume, as does the majority opinion, that the jury would be led to denigrate this instruction, and further instructions regarding their exclusive right to judge the importance and worth of the evidence, because the judge also cautioned against being arbitrarily emotional. This is especially true in view of the fact that the entire sentencing

¹ The instruction was reinforced by Instruction No. 8, and the verdict form, which told the jury it was required to reduce to writing any aggravating circumstances it found but was not required to reduce to writing or otherwise explain any mitigating circumstances it found.

proceeding was devoted to wideranging, unrestricted and wholly individualized evidence regarding Parks' character, record, upbringing, and the circumstances of the crime.²

The fallacy of the majority's assumption that the jury was likely to ignore mitigating evidence is evidenced by the verdict itself. The jury expressly rejected two of the three aggravating circumstances upon which the prosecution strenuously sought an affirmative jury finding: that the murder was especially heinous, atrocious or cruel; and, the probability that Parks would commit criminal acts of violence that would constitute

²² The Court emphasized to Parks' counsel that, "[Y]ou put on whatever evidence you want in mitigation." Tr. Vol. V at 659.

a continuing threat to society. R. Vol. II, Instruction No. 1; Tr. Vol. V at 696-98, 734-35. That verdict necessarily resulted from the jury's individualized assessment of Parks based on the mitigating evidence.

The majority's slant toward a constitutional right to an emotional jury (neatly -- and erroneously-- translated from the context of arbitrary emotion into the more appealing concept of considered mercy), violates the principles of reasoned, channeled, reliable and reviewable sentences. A defendant's life should not hang on the ability or inability of defendant or lawyer to "move" the jury. Stated another way, the problem lies not so much with the life sentence imposed out of random sympathy, as with

the death sentence imposed because the defendant or his lawyer were insufficiently articulate to generate sympathy. The focus in all cases is upon capriciousness in the imposition of the death penalty. In Booth v. Maryland, 107 S.Ct. 2529 (1987), the Supreme Court ruled that the introduction of a victim impact statement ("VIS") at the sentencing phase of a capital murder trial violated the Eighth Amendment. The Court's ruling rests partly on the facts that a VIS focuses on the victim rather than the defendant and serves only to inflame the jury and divert it from deciding the case on relevant evidence. Id. at 2534, 2536. But the ruling also stresses that it is arbitrary to make sentencing decisions

based on the ability of a family member to express his grief. Id. at 2534. The same principle applies to supplications by defendants and their lawyers.

I agree with Justice O'Connor that:

"[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown 107 S.Ct. at 841. See also Franklin v. Lynaugh, 108 S.Ct. 2320, 2333 (1988) (O'Connor, J., concurring). The requirement that sentencing decisions must be rational has been emphasized over and over again by the Supreme Court since Furman v. Georgia, 408 U.S. 238 (1972).

In Gardner v. Florida, 430 U.S. 349, 358 (1976), the Court stated: "It is of vital importance to the defendant

and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." That standard has been referred to repeatedly by the Court in its later decisions. Sumner v. Shuman, 107 S.Ct. 2716, 2723, n.5 (1987) ("sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime" quoting California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring)); Booth v. Maryland, 107 S.Ct. at 2536 ("[A]ny decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'", quoting Gardner v. Florida, 430 U.S. at 358; "reasoned decision making" required in capital

cases); McCleskey v. Kemp, 107 S.Ct. 1756, 1789 (1987) ("[W]e have demanded a uniquely high degree of rationality in imposing the death penalty." (Brennan, dissenting)); Caldwell v. Mississippi, 472 U.S. 320 (1985) ("[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Id. at 329; "[T]his Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Id. at 329,

n.2, quoting Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)); Pulley v. Harris, 465 U.S. 37, 53 (1984) (upholding the constitutionality of a state statute which guaranteed that the jury's discretion will be guided and its consideration "deliberate"); California v. Ramos, 463 U.S. 992, 1018-21 (1983) (Marshall, dissenting) (capital punishment decisions must be "rational," "meaningful," "principled," and "reliable"); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (death sentence must be based on reason rather than caprice or emotion, quoting Gardner v. Florida, 430 U.S. at 358); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (reason rather than caprice or emotion required); Gregg v. Georgia,

428 U.S. 153, 190 (1976) ("reasoned determination" by a jury); Jurek v. Texas, 428 U.S. 262, 274 (1976) (Texas procedure "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender.") (emphasis supplied); Proffitt v. Florida, 428 U.S. 242, 259 (1975) ("[T]here shall be an informed, focused, guided, and objective inquiry into the question whether [a convicted person] should be sentenced to death.").

Indeed, the only circuit decision on point since Brown upholds the constitutionality of an absolute antisympathy instruction, essentially pointing to the reasoning in Brown that "a rational juror could hardly hear this

instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating." Byrne v. Butler, 847 F.2d 1135, 1140 (5th Cir. 1988) (quoting California v. Brown, 107 S.Ct. at 840). Since the instruction in this case before us is not an absolute antisympathy instruction, the majority's disagreement with the Fifth Circuit goes farther than splitting the circuits, it represents an extreme position lacking any support at all in existing cases. The majority's emphasis on the role of emotion is nothing less than a return to standardless and whimsical capital sentencing. It is important to stress again that a jury, especially one that

previously sat through the guilt or innocence stage of the trial and found the defendant guilty of murder, is more likely to have sympathy for the victim and the victim's family than for the defendant. Thus, an instruction like that in question is more apt to help than to harm defendants.

III.

The majority opinion makes no holding on the question of the influence of the prosecutor's statements regarding sympathy. I do not regard them, either alone or in combination with Instruction No. 9, as rendering the jury's sentence constitutionally defective. The overriding reason is discussed in the foregoing sections: the jury instructions clearly guided

the jury with respect to its role and power in general, and with respect to mitigating circumstances in particular. The court made it absolutely clear to the jury that the instructions, not comments by counsel, contained the law, and that the jurors were the sole judges of the facts and the court the sole judge of the law, Tr. Vol. I at 67-68, Tr. Vol. II at 179; Tr. Vol. V at 660; R. Vol. II, Court's Explanation of Instructions, Instructions 2, 6, and 9.

Furthermore, the prosecutor's few references to sympathy and prejudice were combined with references to the jurors' right to consider anything in mitigation (Tr. Vol. V at 703-04), and duty to return a verdict under the law and the evidence (Id. at 730).

Finally, the prosecutor's comments responded to fervent appeals to generalized sympathy by Parks' counsel. Those appeals were based largely upon emotion-generating matters wholly irrelevant to the type of individualized evidence of the defendant's character, record and circumstances of the crime, referred to in the cases cited by the majority: Skipper v. South Carolina, 476 U.S. 1 (1986); Zant v. Stephens, 462 U.S. 862 (1983); Eddings v. Oklahoma, 455 U.S. at 104; Lockett v. Ohio, 438 U.S. 586 (1978); and Woodson v. North Carolina, 428 U.S. 280 (1976).

Thus, for example, Parks' counsel dwelt on his own experiences in Vietnam, and the death of his buddies, Tr. Vol. V at 708-09, 711 ("I've had

to put some of my friends in plastic bags. . . ."), as well as the tragedy of his own terminal illness ("I understand that feeling [having your days numbered] very well myself because I've suffered a serious disease and I very well might not be around much longer. . . ." Id. at 718). Those are appeals to arbitrary sympathy (just as were the prosecutor's passionate remarks seeking sympathy for the victim and his family). It was justifiable to respond to such appeals by referring the jury to the court's instruction cautioning against the influence of arbitrary emotions.

IV.

Borrowing from the Supreme Court's language in Brown, it is utterly implausible that a reasonable juror

would almost perversely single out the word "any" buried in a general instruction, to the exclusion of the sense of the entire instruction, and rely upon it to disregard the court's specific and unequivocal instructions on mitigating circumstances evidence.

Judicial exercises in semantic metaphysics aside, what it boils down to is this: Did the instructions and proceedings as a whole direct these jurors to deliberate reasonably and impose a sentence based on all the evidence? An affirmative answer to that question is unavoidable. There is no substantial possibility³ that Instruction No. 9, either alone or in combination with remarks by the

³ I use this standard because it is the one relied upon in the majority opinion.

prosecutor, prevented "the sentencing jury from giving mitigating effect to any evidence relevant to petitioner's character or background or to the circumstances of the offense." Franklin v. Lynaugh, 108 S.Ct. at 2335 (O'Connor, J., concurring).

APPENDIX

B

88-1264

Supreme Court, U.S.

FILED

JAN 26 1989

JOSEPH F. SPANIO, JR.
CLERK

No. _____,
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

ROBYN LEROY PARKS,
Respondent.

APPENDIX B TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

ROBERT H. HENRY
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January, 1989
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16172

10TH CIRCUIT PANEL

OPINION BY JUDGE MCWILLIAMS

PUBLISHUNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-1400

ROBYN LEROY PARKS,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 JOHN N. BROWN, Warden,)
 Oklahoma State Penitentiary,)
 McAlester, Oklahoma;)
 LARRY MEACHUM,)
 Superintendent, Oklahoma)
 Department of Corrections;)
 and MICHAEL C. TURPEN,)
 Attorney General of)
 Oklahoma,)
)
 Defendants-Appellees.)

Appeal from the United States District
Court For the Western District of
Oklahoma
D.C. No. CIV-84-1618-T)

Vivian Berger, New York, New York
(Lewis Barber, Jr., Oklahoma
City, Oklahoma, with her on the
brief), for Plaintiff-Appellant.

Robert A. Nance, Assistant Attorney
General, Deputy Chief, Federal Division
(Michael C. Turpen, Attorney General
of Oklahoma, and Michael W. Elliott,
Assistant Attorney General, with him on
the brief in chief; and Robert H.
Henry, Attorney General of Oklahoma,
with him on appellees'
supplemental response brief), Oklahoma
City, Oklahoma, for Defendants-
Appellees.

Before MCKAY, BALDOCK, and MCWILLIAMS,
Circuit Judges.

MCWILLIAMS, Circuit Judge.

In a proceeding in the District
Court of Oklahoma County, State of
Oklahoma, a jury convicted Robyn Leroy
Parks of the first-degree murder of
Abdullah Ibrahim, a Gulf gas station
attendant, and the same jury, after

further hearing, sentenced Parks to death. Parks' conviction and sentence were affirmed on direct appeal by the Oklahoma Court of Criminal Appeals. Parks v. State, 651 P.2d 686 (Okla. Crim. App. 1982), and the Supreme Court of the United States denied certiorari, Justice Brennan and Justice Marshall dissenting. Parks v. Oklahoma, 459 U.S. 1155 (1983).

Parks then sought post-conviction relief in the state courts of Oklahoma. The state district court denied relief and the Oklahoma Court of Criminal Appeals affirmed in an unreported order and opinion. Thereafter, the United States Supreme Court denied certiorari. Parks v. Oklahoma, 467 U.S. 1210 (1984).

On June 29, 1984, eleven days before he was scheduled for execution, Parks filed in the United States District Court for the Western District of Oklahoma a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court stayed execution, and, on November 5, 1985, in a 33-page opinion, dismissed all of the claims asserted by Parks in his petition except the claim of ineffective assistance of counsel at the penalty phase of the state criminal proceeding. Before ordering an evidentiary hearing concerning the claim of ineffective assistance, the district court determined to first propound interrogatories to the petitioner, Parks. Based on the answers thereto, the district court, by

order of February 28, 1986, denied relief on the claim of ineffectiveness of counsel and dismissed all claims. This appeal followed. We are advised that the parties have agreed that no new execution date will be set pending disposition of the present appeal.

The government's case-in-chief established the following. Abdullah Ibrahim, a native of Bangladesh, was attending school in Oklahoma and working part-time at a Gulf gas station in Oklahoma City, Oklahoma. On the morning of August 17, 1977, a motorist who had stopped at the Gulf station at around 4:30 a.m. to buy some cigarettes found the attendant, Ibrahim, dead inside the station booth. Ibrahim's death was caused by a gunshot wound in the chest. No money or other property

had been taken from the booth. However, the investigating officers found an unused Gulf gas credit card charge slip in the booth with the letters and figures "XZ-5710" written on it and circled. The police checked out this alpha-numeric combination, and ascertained that it corresponded with the license number of an automobile in which Parks had an interest, possessory, at the least, if not strict legal title thereto.

Parks at this point in the investigation became either a prime suspect or a material witness, and it was ascertained that Parks was then in California. In the meantime the police had contacted a friend of Parks', one James Clegg, and enlisted the latter's aid. Clegg, in Oklahoma, called Parks,

in California, on several occasions, and, with Clegg's consent, two phone conversations were tape recorded. In the first of these two recorded conversations, Parks told Clegg that he went to the Gulf station intending to get gas with a stolen credit card and that the attendant came out of the booth and appeared to write down his license number. Fearing that the attendant would "call the law" and also fearful that if the police caught him they would find guns and dynamite which he had placed in the trunk of his car, Parks decided to kill the attendant so that if "he don't be around there ain't nothing he can tell them noway." In this setting, according to Parks, he went to the station booth and shot and killed the attendant. Apparently, the

door to the station booth was partially open and Parks fired one shot which struck Ibrahim in the chest.

In Parks' second taped telephone conversation with Clegg, Parks, still in California, described where he had disposed of the murder weapon. Thereafter the police, accompanied by Clegg, went to the described location, which was miles away from the gas station, and recovered a .45 caliber revolver, together with a holster and ammunition, hidden under a bush. One shot had been fired from the revolver, the other five cylinders containing live ammunition. Parks was later arrested in California and extradited to Oklahoma. Both of the taped telephone conversations were played for the jury.

At trial, Parks testified in his own behalf and denied killing Ibrahim. He testified that at the time of the killing he was in another place, and a witness corroborated his alibi. Parks explained the fact that the license number of his car was found on the unused credit card slip by stating that several days before the homicide he had been in this particular gas station and had purchased gas when he had no money. He said the attendant at that time took down his license number, but that he had returned later on the same date and paid for the gas. Parks also explained his presence in California at the time of his arrest by testifying that subsequent to the date of the killing he had gone first to Kansas City, and then to California, in an

effort to buy marijuana. On this general state of the record a jury convicted Parks of first-degree murder and the same jury, after further hearing, sentenced him to death.¹

On appeal to this Court, Parks asserts that his state conviction and sentence is constitutionally infirm for any one, or all, of the following reasons: (1) failure of the state

¹At the penalty phase, the State sought three statutory aggravating circumstances. First, the State alleged that the murder was especially heinous, atrocious, or cruel. Second, the State alleged that the murder was committed for the purpose of avoiding or preventing lawful arrest or prosecution. Third, the State alleged the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found only the second statutory aggravating circumstance charged, i.e., that the murder was committed to avoid or prevent a lawful arrest or prosecution.

trial court to instruct the jury on a lesser included offense; (2) admission of a prior conviction of Parks for robbery by force and fear; (3) improper comment to the jury by the state prosecutor in the hearing at the penalty phase of the case; (4) error by the trial court in instructing the jury to disregard "sympathy"; (5) incomplete and misleading instruction on aggravating circumstances vis-a-vis mitigating circumstances; (6) ineffective assistance of counsel at the penalty phase hearing; and (7) failure of the trial court to hold an evidentiary hearing on his claim that Oklahoma's death sentence statutes are applied in a racially discriminatory manner. These matters will be considered seriatim.

I. Lesser Included Offense

The state trial court refused to instruct the jury on murder in the second degree and such fact is alleged to render Parks' conviction for first-degree murder unconstitutional. The state trial court initially refused to instruct on second-degree murder on the ground that "there was no evidence as to how much had been charged on the stolen card." The trial court later grounded its refusal to thus instruct on the fact that there was "no evidence" that a credit card offense had been committed.² The Oklahoma

² The judge stated:

As a matter of fact, the defendant's own testimony was that he didn't even own a credit card. But even in the State's case there was no evidence of a credit card, except his statements and his statements alone do not prove the
(continued...)

Court of Criminal Appeals, on direct appeal, agreed that there was no evidence to support "a lower degree of the crime charged or an included offense" Parks v. State, 651 P.2d, at 690.³

The federal district judge in the present habeas corpus proceeding was unimpressed with the reasoning of either the state trial court or the Oklahoma Court of Criminal Appeals on

²(...continued)

corpus delicti of the crime. There is no corpus delicti of any other felony having been committed. ... There is no evidence and, consequently, it's Murder One or nothing.

³ This holding is consistent with other pronouncements of the Oklahoma courts. See Irvin v. State, 617 P.2d 588, 596 (Okla. Crim. App. 1980) (where no evidence supports requested second-degree murder instruction, unnecessary to instruct thereon); Seegars v. State, 655 P.2d 563 (Okla. Crim. App. 1982).

the lesser included offense argument, but nonetheless reached the same result based on Hopper v. Evans, 456 U.S. 605 (1982) and Palmer v. State, 327 P.2d 722 (Okla. Crim. App. 1958).⁴ In so holding, the federal district judge concluded that the state had made a prima facie case of the greater offense, i.e., murder in the first degree, and that the evidentiary matter relied on by the defendant, Parks, for requesting an instruction on

⁴ In Palmer v. State, 327 P.2d 722 (Okla. Crim. App. 1958), the Oklahoma court held that it was not error to refuse to give a lesser included offense instruction where the state made out a prima facie case of the greater offense, and there was "no evidence whatever to refute the allegations of the information ..."

In order to justify or require the giving of a lesser included offense instruction, there must be "evidence sufficient to raise the issue" 327 P.2d, at 726.

second-degree murder was "no evidence whatever to refute the allegations of the information." The court commented that, under *Palmer v. State*, the evidence relied on by Parks, in order to justify the instruction on second-degree murder, must "raise the issue of whether the defendant was guilty of the lesser offense only." We need not attempt to reconcile these different approaches to the problem, since our view of the testimony relied on by the defendant is such that there was no error in the trial court's refusal to instruct on second-degree murder.

In advancing this particular argument, counsel relies heavily on *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the Supreme Court, citing *Keeble v. United States*, 412 U.S. 205

(1973), commented, at p. 635, as follows:

In the federal courts, it has long been "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser included offense and acquit him of the greater." (Emphasis added).

Our analysis of the evidence relied on by counsel in advancing the lesser included offense argument is that the evidence would not permit a jury to rationally find Parks guilty of second-degree murder and acquit him of first-degree murder.

Under Oklahoma law, a person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Further, "malice" is defined as the "deliberate intention" to take the

life of another, which intent is manifested by "external circumstances capable of proof." Okla. Stat. tit. 21, § 701.7(A) (1981).

Okla. Stat. tit. 21, § 701.7(B) (1981) further provides that a person also commits the crime of murder in the first degree when he kills another, "regardless of malice," in the commission of certain enumerated crimes, such as forcible rape, robbing with a dangerous weapon, kidnapping, and the like. A killing occurring in connection with the use of a stolen credit card is not one of the enumerated crimes constituting murder in the first degree.

Okla. Stat. tit. 21, § 701.8(1981) provides that a homicide is murder in the second degree when perpetrated by

an act imminently dangerous to another, "although without any premeditated design to effect the death of any particular individual." That same statute also states that a homicide is murder in the second degree when perpetrated by a person engaged in a felony "other than" the felonies enunciated in Okla. Stat. tit. 21, § 701.7(B) (1981). Okla. Stat. tit. 21, § 1550.22 (1981) provides, in effect, that it is a felony to unlawfully use or possess a stolen credit card.

Based on the foregoing statutes, Parks argues that under Oklahoma law the state district court should have instructed the jury on second-degree murder and that the failure to so instruct violates the mandate of *Beck v. Alabama*, supra. In thus arguing,

counsel suggests that there is evidence that the homicide in the instant case occurred when Parks was engaged in a felony (using a stolen credit card) other than the ones enumerated in Okla. Stat. tit. 21, § 701.7(B) (1981) and that accordingly an instruction on second-degree murder was mandated by Beck. The argument borders on the ingenious, but in our view does not stand up under a careful analysis of the evidence relied on for the giving of such instruction.

As indicated, Parks testified in his own behalf and denied killing Ibrahim, testifying that he was elsewhere at the time of the homicide. So, there is nothing in the defendant's testimony that would justify giving an instruction on second-degree murder.

The evidence which counsel relies on in advancing the present argument are the statements made by the defendant to Clegg in the two tape-recorded telephone conversations, particularly the first of the two conversations. We do not agree that these statements made by Parks to Clegg required an instruction to the jury on second-degree murder.

Parks, in his statements to Clegg, indicated that he had gone to the Gulf station to buy gas with a "hot" credit card. Presumably, Parks had pumped the gas and had used the "hot" credit card for payment. In any event, thereafter Parks noticed the attendant taking down his license number. Then, Parks, according to his statements to Clegg, formed a deliberate intent to kill the

attendant in the belief that "dead men tell no tales." Parks at the time was apparently concerned not only with the "hot" credit card, but also with the small arsenal, consisting of guns and dynamite, which he had in the trunk of his car. It was in this setting that Parks proceeded to the attendant's booth and, through the partially opened door to the booth, shot Ibrahim once in the chest. This evidence does not justify an instruction on a homicide without malice occurring in the use of a stolen credit card. It only shows a premeditated killing of another with deliberation and malice, the motive, therefore, being a desire to avoid possible detection by the police.

We believe our holding that the evidence in the instant case did not

require an instruction to the jury on second-degree murder squares not only with Beck but that it is also in accord with subsequent decisions of the Supreme Court in such cases as Hopper v. Evans, 456 U.S. 605 (1982) and Spaziano v. Florida, 468 U.S. 447 (1984). Hopper involved a homicide perpetrated during the course of an armed robbery. The defendant, against the advice of his attorney, testified and stated, in effect, that he deliberately shot the deceased in the back. Later, in a federal habeas corpus proceeding brought by the defendant's mother, the Supreme Court held that an instruction on second-degree murder was not required since "the defendant's own evidence negates the possibility that such an

instruction might have been warranted." 456 U.S., at 606. In the instant case, Parks' own statements to Clegg concerning the homicide negate his counsel's claim of second-degree murder.

In *Spaziano v. Florida*, supra, there apparently was evidence, which if believed by the jury, would have supported a verdict of second-degree murder. However, the Florida statute of limitations had run on murder in the second degree, a non-capital offense, but had not run on murder in the first degree, a capital offense. In such circumstance, the state trial judge refused to instruct the jury on second-degree murder unless the defendant agreed to waive the statute of limitations. This the defendant

refused to do, and no instruction was given. The defendant was ultimately convicted of first-degree murder and sentenced to death. The Supreme Court in *Spaziano* found no error in the state trial court's refusal to instruct on second-degree murder, stating that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. Beck does not require that result." 468 U.S., at 455.

II. Admission of Evidence That Parks Had a Prior Felony Conviction

In 1972, Parks, then seventeen years of age, was charged as an adult with robbery by force and fear. He pled guilty to the charge and was given a five-year suspended sentence. A few

years later Parks was also convicted of attempted burglary in the second degree after a felony charge and was imprisoned for three years for that conviction. At the very commencement of the state trial on the murder charge, Parks sought an order which would preclude the use of his prior conviction for robbery at the guilt phase of the proceeding. No challenge was made to the prosecution's possible use of the burglary conviction for impeachment purposes should Parks elect to testify in his own behalf. The reason advanced for the exclusion of the robbery conviction was that Parks was only seventeen years of age at the time of the robbery conviction and that accordingly such conviction was invalid under *Lamb v. Brown*, 456 F.2d 18 (10th

Cir. 1972). See *Radcliff v. Anderson*, 509 F.2d 1093 (10th Cir. 1974) (en banc), cert. denied, 421 U.S. 939 (1975); *Bromley v. Crisp*, 561 F.2d 1351 (10th Cir. 1977) (en banc), cert. denied, 435 U.S. 908 (1978). See also *Edwards v. State*, 591 P.2d 313 (Okla. Crim. App. 1979).

The state trial court denied Parks' request, noting that no challenge had ever been made in state court to the conviction. At trial, then, defense counsel, in his direct examination of Parks in the "guilt-phase" of the state proceeding, brought out the fact of the robbery conviction and the burglary conviction. This was the state of the record on this particular matter when the case went to the jury on the guilt-or-innocence phase of the trial.

Later, in the penalty phase of the bifurcated proceeding, the jury was ultimately apprised of all of the underlying facts leading up to Parks' plea of guilty to robbery with force or fear. In brief, the facts were that Parks, and two other black youths, accosted a white student in a school yard and after a fight took six cents from the victim. All involved were students.

The federal district judge in the habeas corpus proceeding ruled that any possible error in connection with the admission into evidence of Parks' prior robbery conviction was, when viewed in context, "harmless error" as that term is defined in *Chapman v. California*, 386 U.S. 18 (1967). We agree and

are not inclined to disturb that ruling.

At the time when the jury was deliberating the guilt-orinnocence of Parks on the murder charge, the jurors knew about the robbery conviction, but did not, at that time, know of the underlying facts leading up to Parks' plea of guilty to the robbery charge.⁵ However, counsel in the penalty phase of the proceeding went "behind" the robbery conviction and apprised the jury of all the underlying facts and

⁵ Although the fact of the robbery conviction was admitted by Parks on direct examination, the conviction's underlying facts were not presented to the jury at that time. On objection of the prosecutor, the state trial court ruled that Parks' testimony regarding the circumstances surrounding the robbery conviction was incompetent at that stage. The prosecutor did not pursue the robbery conviction on cross-examination.

circumstances. Thus, the jury was eventually fully informed about the entire matter and knew that this was not, by way of example, the armed robbery or a bank by an adult offender, but, on the contrary, arose out of a fracas in a school yard where only six cents was taken from the pocket of the victim.

In our view, this entire episode was de minimis, and must have been viewed as such by the jury. As the federal district court observed, the evidence of Parks' guilt was overwhelming. It is seldom that authorities have a tape-recorded confession to a crime made during the investigative process. In the first taperecorded telephone conversation, Parks admitted the crime

and related details which only the perpetrator could know. In the second recorded conversation, Parks detailed where the death weapon could be found, and the police, following Parks' directions, found the weapon. The introduction of the robbery conviction at the guilt phase of the proceedings is plainly harmless error, if it be error, beyond any reasonable doubt.

In the penalty phase of the proceeding, where the jury was weighing life vis-a-vis death, the jury was fully informed as to the circumstances giving rise to the robbery charge. At that stage, the jury in effect rejected the State's arguments for the sole statutory aggravating circumstance to which this

robbery conviction was relevant, when it refused to find that there was a probability that Parks would commit criminal acts of violence in the future that would constitute a continuing threat to society. See note 1, supra. The only aggravating circumstance contended for by the State which the jury found supported by the evidence was that the murder was committed by Parks for the purpose of avoiding or preventing a lawful arrest or prosecution, which was the reason given by Parks himself for the killing. We refuse to believe that a jury would impose the death sentence because of Parks' conviction for a crime arising out of a school yard fist fight. To us, it is inconceivable that a jury of twelve adults would be influenced in

any manner by such testimony to the end that such would affect their deliberation on either the question of guilt or penalty in a first-degree murder proceeding. We have more faith in the jury system.

III. Improper Comment by State Prosecutor in Closing Argument

Counsel argues that statements made by the prosecutor to the jury during closing argument in the penalty phase of the case come within the prohibitions laid down in Caldwell v. Mississippi, 472 U.S. 320 (1985). The Supreme Court in Caldwell held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

Id., at 328-29 (emphasis added). In Caldwell, the prosecutor, according to the majority opinion, sought to "minimize the jury's sense of the importance of its role." Specifically, the state prosecutor commented that should the jury return a death sentence, such would be "automatically reviewable by the Supreme Court."

In the instant case, the state prosecutor spoke to the jury as follows:

But, you know, as you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he must suffer death. So all you're doing is you're just following the law, and what the law says, and on your verdict once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal justice system that says when this type of type [sic] of thing happens, that whoever does such a hor-

rible, atrocious thing must suffer death. Now that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know.

We do not read the prosecutor's comment to minimize the importance of the jury's role in fixing Parks' sentence. In Darden v. Wainwright, __ U.S. ___, 106 S. Ct. 2464 (1986), the Supreme Court, in footnote 15 at page 2473, stated, in part, as follows:

Caldwell is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to increase the jury's perception of its role. We therefore find petitioner's Eighth Amendment argument unconvincing.

In *Dutton v. Brown*, 812 F.2d 593 (10th Cir. 1987) (en banc), and in *Coleman v. Brown*, 802 F.2d 1227, 1240-41 (10th Cir. 1986) this Court considered closing arguments quite similar, though not completely identical, to that made in the instant case and held that such comment was not constitutionally impermissible. In the instant case, we have read the entire closing argument of both the prosecutor and defense counsel in the penalty-phase of the case. There was no objection by defense counsel to the prosecution's argument. We fail to see how the argument of the prosecution, read in its entirety, tends to minimize or downgrade the importance of the jury's determination of the penalty to be imposed. Indeed, the prosecutor's

remarks tended to dramatize the extreme importance of the matter and was an exhortation to the jury to "follow the law" of both man and God.

IV. Anti-Sympathy Instruction

Instruction No. 9 at the penalty phase of the state proceeding advised the jury, in part, as follows:

You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions (emphasis added).

Trial counsel did not object to the foregoing instruction. However, counsel in the federal habeas corpus proceeding in the district court, and here, argues that the giving of the "antisympathy" instruction constitutes

constitutional error. In thus arguing, counsel relies primarily on Skipper v. South Carolina, ____ U.S. ____ 106 S. Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); and, in a Supplemental Brief, counsel both relies on and distinguishes the recent case of California v. Brown, ____ U.S. ____, 107 S. Ct. 837 (1987).

Neither Skipper, Eddings, nor Lockett concern an instruction to the jury that in their deliberations they should "avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor... These cases all stand for the general proposition that under the Eighth and Fourteenth Amendments the sentencer in a capital case should not be precluded

from considering as a mitigating factor any aspect of the defendant's character and background which might serve as the basis for a sentence less than death. In Skipper, the Supreme Court held that the exclusion of testimony of jailers and of a regular visitor regarding the defendant's good behavior during the defendant's seven months' incarceration in jail awaiting trial deprived him of his right to place before the sentencers "relevant evidence on mitigation." In Eddings, the Supreme Court vacated a state conviction wherein the death penalty was imposed after the state court refused to consider as a mitigating circumstance the defendant's unhappy upbringing and emotional disturbance, including evidence of the defendant's turbulent

family history and beatings by a harsh father. In Lockett, the Supreme Court held that "in all but the rarest kind of capital case, [the sentencer may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death." 438 U.S., at 604 (opinion of Burger, C.J.) (footnotes omitted) (emphasis in original).

In its simplest form, then, Parks' argument is that "sympathy" could serve as the basis of a sentence less than death, and therefore the jury must be allowed to consider it. The Supreme Court recently confronted an "anti-sympathy" instruction in California v. Brown, supra. In that case, the jury was instructed not to be "swayed by

mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase. 107 S. Ct., at 840. The California Supreme Court had held that the anti-sympathy instruction violated the Eighth Amendment and stated that a defendant had a right to "sympathetic consideration of all the character and background evidence" which is presented as mitigating evidence. People v. Brown, 40 Cal. 3d 512, 709 P.2d 440 (Cal. 1985). The Supreme Court granted certiorari and reversed, holding that the antisympathy instruction in Brown did not violate the Eighth or Fourteenth Amendments. It is true that the Supreme Court in Brown noted that the instruction there referred to "mere sentiment, conjecture, sympathy,

passion, prejudice, public opinion or public feeling," whereas the instruction in the instant case did not utilize the adjective "mere." However, such, under Brown, does not dictate a reversal in the instant case, and, in any event, we are not persuaded by the rationale of the California Supreme Court in Brown.

In our view, sympathy" and "mitigating factors" are not synonyms. Mitigating factors are based on evidence arising generally out of testimony concerning a defendant's background and from the facts and circumstances surrounding the crime for which the defendant is on trial. Sympathy, on the other hand, as is evident from the context of the challenged instruction, here plainly

refers to the mere emotional responses of jurors. The instruction directs the jury to make its sentencing decision based on the aggravating and mitigating evidence presented, and not on "extraneous emotional factors." Brown, 107 S. Ct., at 840. A jury should indeed not be influenced by "sympathy" for either the defendant, or, for that matter, for the victim and his family.

In his Supplemental Brief in this Court, petitioner attempts to show that, under the approach of Justice O'Connor's concurring opinion and four dissenters in Brown, the challenged instruction, taken together with certain remarks made by the prosecutor, renders his sentence infirm. In Brown, Justice O'Connor agreed that an anti-sympathy instruction, by itself, does

not violate the Constitution. However, she cautioned that care must be taken, else "juries may be misled into believing that mitigating evidence about a defendant's background or character also must be ignored."

107 S. Ct., at 842 (concurring opinion). Here, however, there is no possibility that the jury was misled concerning its role or the scope of the mitigating circumstances it could consider. The jury was clearly informed that the only bound on the mitigating circumstances it could consider was the evidence found "to exist in this case."⁶ In addition to

⁶ With regard to nonstatutory mitigating circumstances, Parks' jury was instructed as follows:

You are not limited in your consideration to the minimum mitigating
(continued...)

the statutory mitigating circumstances, which the jury was told it must consider, the court instructed the jury

⁶(...continued)
circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine.

In Brown, the jury there was instructed that it could consider nonstatutory mitigating circumstances as follows:

Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Justice O'Connor was concerned that the jury may have understood this instruction to limit its consideration of nonstatutory mitigating factors to evidence about the circumstances of the crime, and to preclude consideration of evidence about the defendant's character and background. See Brown, 107 S. Ct., at 842 (concurring opinion). The instruction given here, however, does not so limit the jury's consideration.

that it "may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case."

Thus the jury was not instructed to ignore mitigating evidence. Such an instruction would indeed run afoul of the principles of Lockett and Eddings. Instead, the jury was instructed to confine its consideration of both aggravating and mitigating factors to the evidence before it, to "avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence," and to discharge its duties "impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions." Since we believe

that a rational juror, hearing this instruction, would conclude "that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating," Brown, 107 S. Ct., at 840, the petitioner's claim based on the "antisympathy" instruction must be denied.

V. Incomplete and Misleading Instructions On Aggravating Circumstances Vis-a-vis Mitigating Circumstances

Instruction No. 7 given the jury, without objection, in the penalty-phase proceeding reads as follows:

In the event you find unanimously that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.

If you do not find unanimously beyond a reasonable doubt one or more of the statutory aggravating

circumstances existed, then you would not be authorized to consider the penalty of death, and the sentence would be imprisonment for life.

Even if you find unanimously one or more of the aggravating circumstances existed beyond a reasonable doubt, and if you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstance, then and in such event the death penalty shall not be imposed, and the sentence would be imprisonment for life.

On appeal, Parks asserts that the foregoing instruction is constitutionally defective in three particulars: (1) the instruction failed to instruct the jury that even if it found that the aggravating circumstances outweighed the mitigating circumstances it could still impose a life sentence and, that the charge instructed the jury, inferentially at least, that if it found that the aggravating circum-

stances outweighed the mitigating circumstances it must impose the death penalty; (2) it improperly places a burden on the defendant of proving that mitigating circumstances outweigh the aggravating circumstances; and (3) it fails to adequately define the nature and function of mitigating circumstances.

Under the instruction set forth above, and in accord with Oklahoma statutory and case law, the jury was instructed that it must impose a life sentence unless it unanimously found beyond a reasonable doubt that one or more of the aggravating circumstances alleged by the state existed. Parks' counsel does not object to this statement. The instruction goes on to advise the jury that even if it should

find beyond a reasonable doubt the existence of one or more of the aggravating circumstances relied on by the state, it must still impose only a life sentence if it should further find that the aggravating circumstances are outweighed by the mitigating circumstances. Again, counsel has no objection to that part of the instruction. As indicated, what counsel does object to is that the instruction did not go further and instruct the jury that even if it found that the aggravating circumstances outweighed any mitigating circumstances, it could, in its discretion, fix the penalty at life imprisonment. Such is apparently not in accord with Oklahoma law. See Irvin v. State, 617 P.2d 588, 598 (Okla. Crim. App. 1980).

See also Parks v. State, 651 P.2d 686, 694 (1982). Nor is such, in our view, required by the Eighth and Fourteenth Amendments.

Since Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court has on numerous occasions tested a state's system for imposing capital punishment for constitutionality. The case we deem most akin to the instant one in this regard is Jurek v. Texas, 428 U.S. 262 (1976). In Jurek, the Texas capital-sentencing procedure was examined and found to be non-violative of the Eighth and Fourteenth Amendments. Under the Texas procedure, where a defendant has been convicted of a capital offense the same jury hears any relevant evidence on the question of life sentence or death, and both the

prosecution and defense counsel may present argument for or against a death sentence. The jury is then presented with two questions, sometimes three, the answers to which will determine whether a death sentence will be imposed. If the jury in a given case unanimously answers all of the statutory questions in the affirmative, then the defendant is mandatorily sentenced to death by the judge. See 428 U.S., at 269. We regard the Texas procedure to be essentially the same as the Oklahoma procedure here under consideration. Under Oklahoma law, if a jury determines that there are aggravating circumstances, and affirmatively identifies them, and if it further finds that such aggravating circumstance, or circumstances,

outweigh any mitigating circumstances, then, but only then, shall the death sentence be imposed. We regard Oklahoma's statutory capital-sentencing procedure to be at the very "tip" of the "pyramid" referred to in *Zant v. Stephens*, 462 U.S. 862 (1983).

We do not read the instruction set forth above as casting any burden of proof on the defendant. Under that instruction, the jury first had the responsibility of determining whether the state had proved beyond a reasonable doubt any of the aggravating circumstances set forth in its Bill of Particulars. If the jury so found, then, and only then, was it to "weigh" the aggravating circumstance thus found against the mitigating circumstances in the case. In this connection, the jury

was instructed that if the mitigating circumstances outweigh the aggravating circumstances, then it must fix punishment at life imprisonment, but in this connection the jury is further instructed, in effect, if not in so many words, that if the aggravating circumstances outweigh the mitigating circumstances, then the penalty shall be death. This, to us, is not a burden of proof matter.⁷

⁷ The Supreme Court has stated that "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant v. Stephens*, 462 U.S. 862, 875 n. 13 (1983). In *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986), also a death penalty case, we recently observed that "sentencing authorities may determine a defendant's fate without regard for burdens of proof or other measures of certainty." 802 F.2d, at 1264. See also *Ford v. Strickland*, 696 F.2d 804, 817-19 (5th Cir. 1983) (opinion of Roney, J.) (burden of proof argument confuses (continued...))

Further, in our view, the jury was adequately instructed on the nature and function of mitigating circumstances. Instruction No. 6 identified eight "mitigating circumstances," and advised the jury that it was not limited to such itemization and could consider "other or additional" mitigating circumstances, if any, you may find from the evidence to exist in this case."⁸

⁷ (...continued)
proof of facts and weighing of facts in sentencing; weighing process not a fact susceptible of proof under any standard); *Sonnier v. Maggio*, 720 F.2d 401, 408 (5th Cir. 1983), cert. denied, 465 U.S. 1051 (1984); *Foster v. Strickland*, 707 F.2d 1339, 1345 (11th Cir. 1983).

⁸ We have examined the cases from other Circuits relied upon by the petitioner, and have determined that they do not support his position. See e.g., *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986) (en banc), cert. denied. (continued...)

VI. Ineffective Assistance of
Counsel In the Penalty Phase
Proceeding

⁸(...continued)

U.S. _____, 107 S. Ct. 421 (1986); Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982). In Peek, the Eleventh Circuit held that the constitution requires only that there be "no reasonable possibility" that a juror will fail to understand "the meaning and function of mitigating circumstances." 784 F.2d, at 1494. In Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), we recently stated that sentencing instructions need only instruct the jury that "the law recognizes circumstances which may be considered as extenuating or otherwise reducing a defendant's culpability and hence his punishment." 802 F.2d, at 1264. In the instant case, the state trial judge's instructions on mitigating circumstances were lengthy and thorough. The jury's attention was clearly focused on the possible existence of mitigating circumstances, and, in Instruction No. 7, the jury was instructed as to its role in the sentencing decision. There is no reasonable possibility that Parks' jury failed to comprehend the nature and function of mitigating circumstances in reaching its decision.

In the federal habeas corpus proceeding, counsel concedes that defense counsel in the state trial court competently and vigorously represented Parks in the guilt phase of Parks' first degree murder trial. However, it is argued here that Parks' counsel thereafter, in effect, "threw in the towel" and that his representation of Parks in the penalty-phase proceeding was constitutionally deficient and that such prejudiced Parks and conceivably tipped the scales for the death penalty, instead of life imprisonment. The record does not support this argument.

Parks was represented in the state trial court by David Hood, who was retained by Parks' father. We agree that Hood's representation of Parks in

the guilt phase of the case was not only constitutionally acceptable, but was, from our reading of the record made in the state trial proceeding, considerably above the norm. The jury returned its verdict of guilty at about five o'clock on a Friday afternoon. Hood and the prosecutor were both of a view to commence the penalty phase of the case immediately. The judge, however, thought the jury was perhaps "tired" and set the penalty phase hearing for eight o'clock a.m. on the next day. In the penalty phase hearing, all of the evidence adduced at the trial, which included all of the testimony of the defendant, Parks, was reintroduced. Hood then called as his only witness Parks' father. Parks' father testified at some length

concerning his son, his home environment, his education and personal traits. The State had earlier indicated that it might not call any witnesses at the penalty-phase hearing, but after the father testified about his son's robbery conviction, the State did call as a rebuttal witness the victim of the fracas in the schoolyard. The victim's father also testified, and it would appear from his testimony that it was the father's insistence which resulted in the filing of charges against Parks.

After closing argument, which was vigorous, the jury received the case around noon. After lunch, the jury commenced their deliberations around 1:30 p.m. and returned the death penalty around 4:45 p.m. At the

request of Hood, who was of course present with Parks when the verdict was received, the jury was polled and all jurors indicated that they had voted for the death penalty.

In the hearing in federal district court, the judge initially denied all of Parks' claims for relief except the one claim of ineffective assistance of counsel. Rather than hold a full-scale evidentiary hearing into the ineffectiveness of counsel argument, the district court decided to first submit written interrogatories to Parks, which interrogatories Parks, in time, answered and thereafter filed supplemental answers thereto. Parks at this point in time was represented by local Oklahoma counsel who presumably

assisted Parks in his answers to the interrogatories. Further, no objection was made at that time to using interrogatories as opposed to a full scale evidentiary hearing.

In any event, the answers indicated quite clearly that the sole basis for the claim of ineffectiveness of counsel was that Hood didn't call more witnesses to testify concerning Parks' personal history. In this court, Park's counsel states that there were "at least 25 of Parks' friends, relatives and associates who would have testified in his behalf," and who "would have painted a more complete picture of him as a human being, i.e., church attendance, good performance in school subjects, his non-violent nature as a youth," and the like. It should

be noted that by the time a claim of ineffective trial counsel was first made, David Hood, who was Parks' trial counsel, was deceased, having died a short time after the trial. Be that as it may, based on Parks' answers to the interrogatories, and upon a review of the record before him, which included a transcript of the state trial proceedings, the federal district judge rejected the claim of ineffective counsel. Under the circumstances, we are disinclined to disturb his ruling on the matter.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that in order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an

objective standard of reasonableness," id., at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694. Thus, in order to grant relief, a reviewing court must find that both parts of the Strickland test are met. The reviewing court must "indulge a strong presumption" that counsel's assistance was effective, and it is the defendant's burden to overcome the presumption that "the challenged action 'might be considered sound trial strategy.'" Id., at 689, quoting Michael v. Louisiana, 350 U.S. 91, 101 (1955). In applying Strickland, we bear in mind that the "essence of an ineffective assistance claim is that counsel's unprofessional

errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, ____ U.S. ____, 106 S. Ct. 2574, 2583 (1986).

Applying these principles to the instant case, we agree with the federal district court that Parks cannot prevail on his claim of ineffective counsel. The fact that counsel did not call a succession of witnesses who would presumably testify concerning Parks' boyhood years and testify generally as to his character does not show deficient performance by defense counsel. *See Dutton v. Brown*, 812 F.2d 593 (10th Cir. 1987). Under the circumstances, deciding not to call character witnesses was perhaps a wise

tactical move. Such witnesses would have been subject to cross-examination and rebuttal. Though Parks may have had an innocent boyhood, his more recent past was not so spotless. In addition to his plea of guilty to the robbery charge, Parks had also been convicted of burglary for which he had served time. Further, as mentioned above, Parks at the time of the homicide was apparently in the drug business. At least that was Parks' own testimony at trial where he explained his presence in California at the time of his arrest by stating that he was in California on a "buying trip." This aspect of the case, of course, was not fully explored in the guilt-phase proceeding, but no doubt defense counsel felt that if he tried at the

penalty phase proceeding to inject Parks' general character into the case, the state would endeavor to bring out all the details of Parks' current endeavors, including his trafficking in drugs, as well as the guns and dynamite, which were apparently in the trunk of Parks' vehicle, and the purpose for which they were intended.

Counsel argues here that at the very least Parks should have been given an evidentiary hearing on the claim of ineffective counsel and points out that there was an evidentiary hearing in Strickland. We do not believe, however, that an evidentiary hearing must be given in every case involving a claim of ineffectiveness of counsel. In the present case, defense counsel was not available to testify, having

died shortly after the state trial. The federal district judge did not reject, out of hand, Parks' claim that defense counsel's courtroom performance was constitutionally deficient. He allowed Parks, assisted by his counsel, to answer interrogatories. And these answers, and supplemental answers, indicated quite clearly that the only fault he had with his counsel was his failure to place his entire history before the jury. If counsel had placed before the jury the entire rec

proceeding would be that counsel was deficient in permitting his life history to go to the jury. In our view, defense counsel did a competent and vigorous representation of Parks throughout the entire trial. His arguments to the jury were impassioned. In the words of Strickland, Parks' present claim of deficient representation is grounded on "the distorting effects of hindsight." 466 U.S., at 689.

VII. Refusal of the Federal District Court To Hold an Evidentiary Hearing on Parks' Claim That Oklahoma's Death Penalty Statutes Are Applied Arbitrarily and Discriminatorily Against a Defendant Such as Himself Charged with Killing a White Victim

In his petition for habeas corpus, Parks urged as his ninth ground for relief that the application of the

death sentence to his case violated his Eighth and Fourteenth Amendment rights. In his petition, Parks initially stated that his case is perhaps the only case where a death sentence was imposed solely on the aggravating circumstance that at the time of the homicide he was attempting to avoid arrest or detection, and that in 90% of the cases where a death sentence was imposed in Oklahoma the jury either found that the offense was heinous, atrocious and cruel, or that there was a probability that the defendant would constitute a continuing threat to society because of his record of violent misconduct, neither of which was the finding of the jury in his case. This particular reason apparently fell by the wayside and was

not pursued in the district court, nor is it raised in this Court.

In his petition, and as a part of this ninth ground for relief, Parks also urged that based on a study by Samuel R. Gross, an Acting Associate Professor of Law at Stanford University, and Robert Mauro, an Assistant Professor of Psychology at the University of Oregon, one is more likely to receive the death penalty in Oklahoma if he has killed a white person than if he has killed a black person. In this connection, it is further alleged that Parks "will further bring out evidence of other forms of racial discrimination in Oklahoma County." In support of this claim, Parks later proffered to the federal district court Professors Gross

and Mauro's study, since published as Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (1984) (the Gross-Mauro Study).

The federal district court declined to hold an evidentiary hearing on the claim of racial discrimination in the application of Oklahoma's death penalty statutes. The judge was of the view that what may have happened in some other case didn't prove, or even tend to prove, what had occurred in Parks' case.

The conclusion of the Gross-Mauro study is that it is the color of the victim, rather than the color of the defendant, that impels a jury to more readily return a death penalty vis-a-

vis a life sentence. In the instant case, the victim, Abdullah Ibrahim, was a native of Bangladesh temporarily in the United States, and he is not white-skinned, but, from the photograph in the record before us, is very dark-skinned. Under such circumstances, a court would be going far afield to hold an evidentiary hearing on the basis of the Gross-Mauro study. A Bangladesh victim does not appear to fall into place in the Gross-Mauro study.⁹

⁹ The Gross-Mauro study itself states that "cases involving Asian or American Indian defendants or victims have been removed from any tabulations that include the racial characteristics of the defendants or of the victims, respectively, from all regression analyses, and from tabulations involving our scale of aggravation." Patterns of Death, 37 Stan. L. Rev., at 52 (footnote omitted).

Moreover, the Supreme Court recently considered and rejected a similar claim in McClesky v. Kemp, ____ U.S. ____, 107 S. Ct. 1756 (1987). In McClesky, a study similar to the Gross-Mauro study offered here was considered. That study (the Baldus study) purported to show a disparity in the imposition of the death penalty in the State there involved, Georgia, on the basis of the race of the murder victim.¹⁰ McClesky there argued, as Parks does here, that the statistical disparities shown by

¹⁰ The Baldus study also purported to show a disparity in the imposition of the death penalty based on the race of the defendant, although to a lesser extent. In contrast, the Gross Mauro study here at issue indicates that, in Oklahoma, the race of the suspect did not have a statistically significant role in the imposition of the death penalty. See Patterns of Death, 37 Stan. L. Rev., at 97 n. 187.

the proffered study demonstrated that Georgia's capital punishment statute violated both the Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment's ban on "cruel and unusual punishments." See McClesky, 107 S. Ct., at ____.

The Supreme Court rejected McClesky's Equal Protection Clause argument. It held that in order to prevail on the equal protection claim, McClesky had to "prove that the decision makers in his case acted with discriminatory purpose." McClesky, 107 S. Ct., at ____ (emphasis in original). The Supreme Court examined the Baldus study and found it "clearly insufficient to support an inference that any of the decisionmakers ... acted with

discriminatory purpose."¹¹ The Supreme Court also rejected McClesky's Eighth Amendment claim that his death sentence was excessive since racial considerations may have influenced capital sentencing decisions in Georgia. It found that at most, "the Baldus study indicates a discrepancy that appears to correlate with race," *id.*, at ____, and refused to assume that the unexplained discrepancy resulted from invidious racial discrimination. The Gross-Mauro study proffered here is similar to the Baldus study considered in McClesky. Like the Baldus study, it does not show what

¹¹ At an evidentiary hearing, McClesky's expert witness testified that the Baldus study did not show what occurred in any given case. McClesky, 107 S.Ct., at ____, n. 11.

transpired in Parks' case. Nor does it demonstrate a "constitutionally significant risk" of racial discrimination.¹²

Parks has offered no evidence that would support an inference that the decision makers in his case acted with a discriminatory purpose. As indicated, such evidence is essential in order to prevail under the Equal Protection Clause. Parks' Eighth Amendment claim must also fail. He has

¹² 12 The Gross-Mauro study concluded that in Oklahoma, "the odds of receiving the death penalty for killing a white were 4.31 times greater than the odds of receiving the death penalty for killing a black." Patterns of Death, 37 Stan. L. Rev., at 96 n. 184. This figure is substantially identical to that which the Supreme Court characterized as "not demonstrat[ing] a constitutionally significant risk of racial bias" McClesky, 107 S.Ct., at ____.

not demonstrated a "constitutionally significant risk of racial bias." As the Supreme Court has observed, discrepancies in sentencing decisions appearing in studies such as the proffered Gross-Mauro study are but an inevitable part of our criminal justice system. See McClesky, supra. 107 S. Ct., at ____.

Finally, the additional proffer by Parks that if given time he could "bring out evidence of other forms of racial discrimination in Oklahoma County" is conclusory and non-specific in nature, and did not require the district court to hold an evidentiary hearing. See Andrews v. Shulsen, 802 F.2d 1256, 1266 (10th Cir. 1986) where we upheld a district court's ruling that an evidentiary hearing was

unnecessary where the allegations of discrimination in fact were conclusory, stating that a "habeas petitioner must provide supporting factual allegations."

In sum, we think the defendant got a fair trial. Perhaps not a perfect one, but we know of no rule that in a capital case the trial must be perfect. Certainly there is nothing before us to indicate that the entire proceeding was fundamentally unfair, or that there has been a miscarriage of justice. Parks' defense, as stated, was an alibi. The jury rejected that defense. Accordingly, the facts and circumstances of the homicide, coming necessarily from only the state's evidence, showed a senseless, coldblooded killing, the evidence therefor coming from the

defendant himself. And, as previously stated, defense counsel did all he could do with what he had to work with.

Judgment affirmed.

10TH CIRCUIT PANEL

OPINION BY JUDGE MCKAY,
CONCURRING IN PART AND
DISSENTING IN PART

No. 86-1400 - PARKS v. BROWN

MCKAY, Circuit Judge, concurring in part and dissenting in part:

While I concur in parts II, V, VI, and VII of the majority's opinion, the issues raised in parts I, III, and IV compel me to dissent in this death penalty case.

The murder committed by Robyn Parks was, as all murders are, a personal tragedy for the victim's family and an affront to society's moral sensibilities. Yet, capital punishment is not the usual punishment inflicted in capital murder cases. As Justice Brennan recounted in 1972:

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was

128; in the 1950's, it was 72; and in the years 1960-1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. Yet our population and the number of capital crimes committed have increased greatly over the past four decades.

Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) (emphasis added and footnote omitted).

In the pre-Furman era, less than twenty percent of those convicted of murder were sentenced to death in those states that authorized capital punishment. See Woodson v. North Carolina, 428 U.S. 280, 295 n.31 (1976). Even if current statistics regarding the rate of imposition of the death penalty in the post-Furman era would show a dramatic increase in its use, I have no doubt that the rate fails to approach by an exceedingly large margin the rate of

homicides in this country. The disparity is for good reason. "[T]his most irrevocable of sanctions should be reserved for a small number of extreme cases." Gregg v. Georgia, 428 U.S. 153, 182 (1976). The relatively low incidence of the death penalty as compared to the homicide rate in this country indicates that juries obviously agree with this proposition.

At common law, the death sentence was mandatory for all convicted murderers. In twentieth century America, the use of the death penalty was reduced both by narrowing the class of murders to which the penalty attached and by vesting the jury with discretion in the penalty's imposition. See Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982); Gregg, 428

U.S. at 176-79. The Gregg Court rejected the notion that our "standards of decency had evolved to the point where capital punishment no longer could be tolerated." Id. at 179. However, the Court recognized that the penalty's imposition must be tailored so as to avoid arbitrary and capricious imposition based on irrelevant biases and prejudices. A death sentence imposed because of these impermissible considerations violates the eighth amendment. Even a cursory reading of the post-Furman cases reveals that, through principles enunciated in those cases, the Court has attempted to restrict the jury's attention only to those considerations that may properly impact on the individual sentencing determination before them. In fact,

the issues in parts I and II that follow involve precisely such issues.

The evolution of capital punishment for the crime of murder thus evinces the conclusion that to be constitutional today, a death sentence must be closely intertwined with the facts of the murder and the propensities of the defendant and must not be actuated by extraneous influences. Although the jury may not be discriminatory, it is constitutionally bound to be discriminating. The decision to impose the death penalty in a particular murder case properly revolves around such parameters as the depravity of the murder (i.e., a torture-killing, multiple and hideous wounds, etc.) and the demonstrated violent propensities of the defendant. These are the types

of factors that differentiate those "routine murder case[s]," Jackson v. Virginia. 443 U.S. 307, 328 (1979) (Stevens, J., concurring), that do not result in the imposition of the death sentence from those far fewer murder cases that do result in the death penalty.

In short, the post-Furman cases have established guidelines to ensure that juries do not impose the death sentence in the "routine murder case" but rather only in those extraordinary murder cases that warrant it. At bottom, though unarticulated, is a sense of proportionality in sentencing. When the death sentence is imposed in the "ordinary" murder case, the likelihood that impermissible factors influenced

the sentencing determination is increased.

Along with those murders committed in the heat of passion by someone known to the victim, murder committed in the course of committing a robbery seems to me to epitomize the "run-of-the mill" murder. The victim in this case was killed by a single gunshot wound to the chest, apparently when Mr. Parks attempted to buy gasoline with a stolen credit card. The facts do not indicate that Mr. Parks stopped at this station expressly to kill the attendant. There was no evidence of torture or other wounds. His only prior conviction was as a juvenile and involved a schoolyard scuffle. As unfortunate as these facts are, the imposition of the death sentence for this murder is

disquieting, unless the death penalty is to be imposed in every murder case. Its imposition in this case thus requires close scrutiny to ensure that the jury's focus was properly channeled to only those considerations that may appropriately impact upon the sentencing determination.

I.

I agree with defendant's contention that the prosecutor's remarks in the sentencing phase of the trial violated the principles articulated in Caldwell v. Mississippi, 472 U.S. 320 (1985). The Supreme Court has recently interpreted Caldwell to prohibit those comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the

sentencing decision." Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986) (emphasis added). Near the close of his argument in chief, the prosecutor made the following remarks:

And then you may say, well, you know, yeah, I still mean it, I could, without doing violence to my conscience if this was a proper case; but, you know, I really don't want it on my hands that I had anything to do with anybody dying. So for that reason, although this is a proper case, I don't want to assess the death penalty because I just don't want to have to think about that. I don't want it on my conscience.

Well, I don't think it's on Robyn Parks' conscience that he took an innocent person's life away; and I don't believe in observing him throughout this trial and his testimony and listening to his voice on the tapes--I don't feel like there's the least bit of remorse in him over what he did. But, you know, as you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You just have become a part of the criminal-justice system that says when anyone does this, that he must suffer

death. So all you are doing is you're just following the law, and what the law says, and on your verdict--once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal-justice system that says when this type of type of [sic] thing happens, that whoever does such a horrible, atrocious thing must suffer death.

Now, that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know.

Record, vol. 6, at 707-08.

Such an argument was designed to do precisely that which Caldwell specifically prohibits: to allow the jurors to minimize their sense of personal responsibility for imposing the death sentence. "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for

determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 472 U.S. at 328-29. Such delegation of sentencing responsibility "presents an intolerable danger of bias toward a death sentence." Id. at 331.

The prosecutor's statements here freed the jurors from personal accountability for Mr. Parks' sentence of death by arguing that all the jury was doing in assessing the death penalty was following the mandates of the law. By implying that the law affirmatively prescribed the death penalty in this case, minimizing any sense of jury discretion in imposing the death sentence, the prosecutor allowed the jurors to feel as if their "hands were tied." He allowed them to feel as if they weren't choosing to

impose the death penalty; the law required it. Portions of his argument merit repeating for illustration:

You just have become a part of the criminal-justice system that says when anyone does this, that he must suffer death. . . . [O]nce your verdict comes back in, the law takes over. The law does all of these things. . . . You're just part of the criminal-justice system that says when this type of type of [sic] thing happens, that whoever does such a horrible, atrocious thing must suffer death.

Record, vol. 6, at 707 (emphasis added). In essence, he told the jurors that they were not responsible for sentencing Robyn Parks to death; the ephemeral "criminal justice system" was responsible. The jurors were invited to shift, or at least diffuse, their sense of ultimate responsibility to "the law" that required them to sentence Mr. Parks to death.

The majority opinion finds the statements made in this case to be "quite similar," maj. op. at 16, to those we found to be constitutional in both Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc), and Coleman v. Brown, 802 F.2d 1227 (10th Cir.1986).¹³

¹³ The majority also notes that "[t]here was no objection by defense counsel to the prosecution's argument." Maj. op. at 16. In Dutton, there also was no objection at trial; in fact, the issue was not pursued at any time in the appellate process. The issue was raised for the first time in the habeas proceedings. However, the en banc court found cause for the procedural default because the trial occurred in 1979, six years prior to Caldwell in 1985. The court stated that counsel "could not have known that the prosecutor's remarks might have raised constitutional questions." Dutton, 812 F.2d at 596. Robyn Parks' trial occurred in 1978, seven years before Caldwell and even a year before Dutton. Considering the en banc court's treatment of this problem in Dutton, it seems disingenuous to me to (continued...)

I very much disagree and set out in the margin the challenged statements made in those cases for comparison purposes.¹⁴

¹³(...continued)
apparently fault counsel in this case for not objecting at trial. At least he had the foresight, unlike counsel in Dutton, to pursue the issue on direct appeal.

The challenged statements in Dutton were as follows:

First of all, [Defense Counsel] argues that the final decision is yours, and of course, to some degree it is. But you are, as I am, as Judge Theus is, as all the courts are, part of the process. We are not functioning as individuals. I am not here as Andy Coats. I am here as the District Attorney.

And you are not here in your individual capacities. You are here as the jury. And Judge Theus is not our good friend, Harold, off the Bench. He is his Honor, Judge Harold Theus, when he is in this Courtroom.

And we are all part of the law and it is the law that makes us work. So it
(continued...)

The prosecutor in Dutton attempted to define the juror's roles functionally instead of individually but did not

¹⁴(...continued)
has to be in that attitude, in that frame of mind, that you approach the problem.

Dutton, 812 F.2d at 596.

The challenged statements in Coleman were as follows:

III In closing I say to you that they try to put the responsibility on you, like it's all your fault. To a certain extent--I don't mean to imply, I don't mean to imply that it's put on you like it's your fault if you do something in this case. I don't mean to imply that necessarily, but let me make it real clear that you're not writing the verdict in this case. Don't--don't be mistaken into believing that it's your responsibility that this happened, that you're, you're writing the verdict. I, I say to you, this man wrote the verdict on February 9th, and all those days after when he got out of jail and went on [sic] spree of knifing and kidnapping and killing. He wrote the verdict. This man. He wrote it in blood over and over.

Coleman, 802 F.2d at 1240.

minimize the juror's sense of responsibility within those roles. The remarks in Coleman stressed that the defendant was responsible for his own plight but did not intimate that the awesome responsibility of imposing the death sentence did not rest solely with the jury. The statements made in the present case were much more egregious, directed squarely at attempting to ameliorate any sense of accountability for the decision that this man must be executed.

Moreover, we found it critical in both Dutton and Coleman that the prosecutor made subsequent remarks stressing the importance and exclusivity of the jury's role in the sentencing determination. "It is clear that, when taken in context, the

statement of the prosecutor was not constitutionally impermissible. . . .

Indeed, the tenor of the remainder of the closing was that the crucial determination of punishment was the sole function of the jury." Dutton, 812 F.2d at 596-97 (emphasis added). "Moreover, viewing this argument in context, it is evident that the prosecutor had no intention of diminishing the jury's sense of responsibility." Coleman, 802 F.2d at 1241 (emphasis added). We quoted the prosecutor's subsequent remarks at length in our Coleman opinion. See id. In the present case, the prosecutor made no additional remarks that may have mollified his impermissible comments. He basically closed his

argument in chief with the unconstitutional statements.

The Supreme Court's concluding statement in Caldwell is equally applicable in this case.

This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.

Caldwell, 472 U.S. at 341.

II.

The defendant challenges the following instruction given during the penalty phase: "You must avoid any influence of sympathy, sentiment,

passion, prejudice or other arbitrary factor when imposing sentence." The anti-sympathy instruction held constitutional in California v. Brown, 107 S.Ct. 837 (1987), informed the jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." Id. at 839. The majority in this case notes that the present instruction does not include the word "mere" but cursorily concludes without explanation that "such, under Brown, does not dictate a reversal in the instant case." Maj. op. at 19. By denigrating any significance in the additional word "mere" in the Brown instruction, this majority misses the thrust of the Supreme Court's analysis in upholding the instruction in that

case. Moreover, the majority fails to consider the significance of the modifying phrase in the present instruction--"any influence of"--as it relates to the Brown analysis. Such modifiers as "mere" and "any," however, are critical to the analysis. In Brown, Justice Rehnquist wrote, "By concentrating on the noun 'sympathy,' respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy." Id. at 840 (emphasis added only to "crucial fact"). Likewise, the majority in this case ignores the crucial fact that the jury was instructed to avoid basing its decision on any influence of sympathy.

Not all forms of sympathy are impermissible considerations in the

sentencing decision. Only general feelings of sympathy not connected to the particular defendant and the evidence introduced are prohibited, for such would allow the imposition of the death sentence in an arbitrary and unpredictable fashion. The Brown court recognized that there are different "sorts" of sympathy and that sympathy tethered to evidence introduced during the penalty phase, such as evidence of a disadvantaged background or emotional problems, is a proper element for the jury to consider when deciding whether to impose the death penalty.¹⁵ "We think a reason-

¹⁵ Even the State in Brown acknowledged that sympathy for the defendant is an appropriate consideration in sentencing. It only argued, and the majority of the Court agreed, that the antisympathy instruction there
(continued...)

able juror would . . . understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." Id. at 840 (emphasis added). "[I]ndividualized consideration of mitigating factors," Lockett v. Ohio, 438 U.S. 586, 606 (1978) (emphasis added), is the key, which is why sympathy rooted in the evidence presented for a particular defendant is permissible whereas generalized, "untethered" sympathy is not. Cf.

15(...continued)
 given "simply prevent[ed] the jury from relying on 'untethered sympathy' unrelated to the circumstances of the offense or the defendant." Brown, 107 S. Ct. at 843 (Brennan, J., dissenting).

Eddings, 455 U.S. at 112-16 (evidence of turbulent family history, of beatings by a harsh father, and of serious emotional disturbance proper consideration in assessing death penalty); Woodson, 428 U.S. at 303 (must allow "particularized consideration of relevant aspects of the character and record of each convicted defendant"). The entire thrust of the majority's opinion in Brown was that an instruction prohibiting "mere sympathy" sufficiently conveyed that critical distinction to the jury. The majority and dissent in Brown parted ways not on the assumption that sympathy rooted in evidence is a proper consideration in sentencing, but rather on whether the instruction at issue sufficiently

instructed the jury regarding the difference between "tethered" (permissible) and "untethered" (impermissible) sympathy. See Brown, 107 S. Ct. at 843 (Brennan, J., dissenting).¹⁶

¹⁶ Although Justice O'Connor concurred in the majority opinion, resulting in a 5-4 decision upholding the instruction, she also submitted a concurring opinion in which she voiced concern over the collective effect of the court's instructions and the prosecutor's closing arguments. She was troubled that the prosecutor "may have suggested to the jury that it must ignore the mitigating evidence about the respondent's background and character." Brown, 107 S. Ct. at 842 (O'Connor, J., concurring).

Along a similar vein, I am concerned that the prosecutor's admonitions that the jury must avoid all sympathy, in tandem with the court's overreaching sympathy instruction, created a "legitimate basis for finding ambiguity concerning the factors actually considered by the jury." Id. (citation omitted). In rebuttal to the defense's arguments, the prosecutor stated:

(continued...)

The instruction in the instant case fails to differentiate that sympathy which may permissibly impact upon the sentencing decision from that which may not. It prohibited "any influence of sympathy," which is qualitatively quite different from avoiding "mere sym-

¹⁶(...continued)

His closing arguments are really a pitch to you for sympathy--sympathy, or sentiment or prejudice; and you told me in voir dire you wouldn't do that.

Well, it's just cold turkey. He either did it or he didn't. He either deserves the death penalty or he doesn't, you know. You leave the sympathy, and the sentiment and prejudice part out of it.

Record, vol. 6. at 725-26. The prosecutor's remarks buttress the court's over-inclusive sympathy instruction and, while not sufficient in themselves to warrant reversal, further undermine the reliability of the death sentence imposed in this case.

pathy." It forecloses any possibility of considering sympathy of any sort and is thus distinguishable on a critical point--the point on which the Supreme Court's analysis was founded--from the instruction narrowly condoned in Brown. By prohibiting consideration of all sorts of sympathy, the instruction violated Eddings, Lockett, and Woodson and hence fails constitutional muster. Moreover, the instructions given as a whole failed to cure this fatal defect. See Brown, 107 S.Ct. at 839 (if specific instruction fails, must then review entire charge to determine whether it delivered a correct interpretation of the law).

The damage is particularly acute in this case because the only mitigating evidence presented was testimony from

defendant's father with respect to defendant's difficult childhood spent in various relatives' homes and his generally nonviolent nature. The jury was instructed to ignore any influence of sympathy--presumably even that sympathy tethered to this testimony, defendant's sole mitigating evidence. It is constitutionally impermissible to prohibit the jury from considering, relative to the individual offender, those "compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson, 428 U.S. at 304. Brown v. California does not shield such an instruction.

III.

The defendant requested and was denied a lesser included offense instruction for second degree murder

involving homicide while committing the felony of using a fraudulent credit card. Beck v. Alabama, 447 U.S. 625 (1980), provides that there is a constitutional right, at least when the death penalty is imposed, to a lesser offense instruction warranted by the evidence. See generally Trujillo v. Sullivan, 815 F.2d 597, 600-04 (10th Cir. 1987) (discussing whether Beck extends the constitutional right to cases in which the death penalty is not imposed). As a matter of federal constitutional law, Mr. Parks was thus entitled to his instruction as long as there was evidence before the jury to support it, whether or not the Oklahoma courts would apply a stricter standard

for the giving of such an instruction under state law.¹⁷

¹⁷ Although not controlling in a federal constitutional analysis, Oklahoma state law is, in fact, very permissive in this regard. Under Oklahoma law, a defendant is entitled to instructions on every lesser offense that the evidence reasonably suggests. See McCullough v. State, 669 P.2d 311, 312 (Okla. Crim. App. 1983). Oklahoma extends the right even where supporting evidence is "slight," resolving all doubts in favor of the accused. See Dennis v. State, 561 P.2d 88, 94 (Okla. Crim. App. 1977); Morgan v. State, 536 P.2d 952, 956 (Okla. Crim. App. 1975).

The federal district court in this case relied in part on another Oklahoma case, Palmer v. State, 327 P.2d 722 (Okla. Crim. App. 1958), in concluding that "in order to justify the instruction on second-degree murder, [the evidence] must 'raise the issue of whether the defendant was guilty of the lesser offense only.'" Maj. op. at 7 (quoting district court). The majority opinion does not rely on the district court's analysis in reaching the same result. However, because I reject the majority's analysis, I must address the alternative analysis ostensibly supporting that result. While I could
(continued...)

17 (...continued)

simply and easily rely on the assertion made above in the text that federal constitutional requirements override Oklahoma state law as interpreted by the district court, I feel compelled to refute this troublesome, and I believe erroneous, interpretation of Oklahoma law.

The defendant in Palmer was convicted of the felony of leaving the scene of an accident involving personal injury. He alleged error in the trial court's failure to instruct on the misdemeanor of leaving the scene of "an accident resulting only in damage to a vehicle." Id. at 724 (quoting applicable Oklahoma statute) (emphasis added). The words defining the lesser offense required that there be no personal injury but only property damage in order for the statute to be violated. Because there clearly was record evidence that the accident at issue resulted in personal injury, there was no record evidence that the misdemeanor had been committed. The trial court's refusal to instruct on the lesser offense was thus upheld on the well-accepted grounds that there must be some evidence in the record supporting the lesser offense in order to justify a lesser offense instruction. The word "only" was significant in that case solely because
(continued...)

17 (...continued)

the lesser offense statute employed it in defining the offense itself. Palmer is thus a unique case confined to its particular facts and to offenses that are similarly defined in restrictive terms.

In failing to recognize the uniqueness of the statutory definition of the lesser offense in Palmer, the district court imported the word "only" into every lesser offense definition. By so doing in this case, the district court in effect judicially engrafted a new element onto a second degree murder offense--that the greater intent of malice required for first degree murder be positively disproved. Absent evidence showing that "only" the lesser offense was committed, no lesser offense instruction is necessary under the district court's reasoning. If such were the rule, we would rarely ever see a lesser offense instruction, for if the evidence showed that only the lesser offense was committed, an instruction on the greater offense would be improper. Rarely could a case ever go to a jury on more than one theory. Suffice it to say that Oklahoma's subscription to the "any-evidence test," see Morgan, 536 P.2d at 956, belies such an interpretation of Oklahoma law. Moreover, even if that interpretation of Oklahoma law were
(continued...)

The majority concludes that defendant's alibi defense precludes any lesser offense instruction, implying that any evidence in the record supporting a lesser offense instruction must come from the defendant to entitle him to the instruction. "Parks testified in his own behalf and denied killing Ibrahim, testifying that he was elsewhere at the time of the homicide. So, there is nothing in defendant's testimony that would justify giving an instruction on second-degree murder." Maj. op. at 9 (emphasis added).

I simply find no law for this proposition, and I think it would be a bad rule to write. Anytime a defendant

17 (...continued)
correct, such would clearly raise due process concerns under the United States Constitution.

honestly denied participation in a crime, he or she would automatically forego the right to an instruction on a lesser offense supported by other evidence before the jury. Even if the evidence, albeit from a source other than the defendant, were overwhelming that a lesser offense was committed, no instruction could be given unless the defendant, possibly perjuring himself or herself, admits some participation in the incident. Fearing conviction of the greater offense even though innocent, a defendant is caught between maintaining his or her innocence, risking such a conviction, and falsely admitting participation so as to gain a lesser offense instruction. Such coercion is constitutionally untenable. If the evidence of a lesser offense is

before the jury, defendant's entitlement to a lesser offense instruction should not depend upon whose witness introduced the evidence. A jury could reject the defendant's alibi defense but accept that the evidence supports conviction on the lesser offense rather than the greater.

There was sufficient evidence before the jury in this case to support a lesser offense instruction. The two taped telephone conversations around which the prosecution's entire case revolved furnished evidence sufficient to give an instruction that the homicide was committed while using a stolen credit card. See ct. ex. 1, 2, record, vol. 5. (And, in a sense, the evidence did come from the

defendant through his taped conversations.)

In meeting this evidence, the majority does what is solely within the jury's province to do. It interprets the evidence as showing that the felony of using a stolen credit card was completed and only "thereafter" did Mr. Parks form "a deliberate intent to kill." Maj. op. at 9-10. Whether the predicate offense supporting the second degree murder charge ended the moment Mr. Parks paid for the gasoline but before he left the station so that any action "thereafter" was not connected to the offense or actuated by the offense is a matter for the jury in deciding whether to convict on the lesser offense--an option the jury was never given in this

case. Indeed, whether in fact the killing occurred after defendant completed the credit card transaction is not clear from the evidence and is a fact appropriately determined only by the jury. These are not matters to be decided in evaluating whether there was sufficient evidence supporting an instruction.

We need not be convinced that the crime committed was second degree murder rather than first degree murder. That differentiation is for the jury to make. Our job is merely to consider whether there was sufficient evidence in the record, from whatever source, to justify at least giving the instruction. The majority, rather than examining the record evidence of second degree murder to determine its

existence for purposes of instruction, has evaluated such evidence and rejected it in favor of the evidence supporting first degree murder. That is an usurpation of the jury's function.

Moreover, the assertion that there was no evidence in the record of homicide while committing the felony of using a fraudulent credit card is at direct odds with the trial court's instructions in the penalty phase regarding the applicable aggravating circumstances. The Bill of Particulars read to the jury asserted the following as an aggravating circumstance supporting the imposition of the death penalty:

The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. Defendant had been in the service

station attended by victim. Victim took down Defendant's tag number. Defendant suspicioned [sic] victim was going to call the law as soon as he left. Defendant felt if he killed the victim there would be nothing the victim could tell the police and he would not be apprehended.

Record, vol. 6, at 661. This allegation in the Bill and the court's ensuing instruction on this aggravating circumstance were consistent with the single theory advanced by the prosecution throughout both the guilt phase and sentencing phase of Mr. Parks' trial: that Robyn Parks had killed in the course of using a stolen credit card in order to avoid arrest for that crime. See, e.g., record, vol. 6, at 185-86, 631-32, 661, 697-700, 708; ct.ex. 1, record, vol. 5, at 2-3, 12. This aggravating circumstance was the only one found by the jury to

be applicable beyond a reasonable doubt in this case. The jury rejected as aggravating circumstances: (1) the murder was especially heinous, atrocious and cruel; and (2) there existed a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

The trial court evidently found sufficient evidence in the record to support submitting the "avoiding lawful arrest" aggravating circumstance instruction. Yet, now the majority asserts that there was no evidence supporting the requested lesser offense instruction based on that same evidence. I cannot fathom how we can uphold the jury's imposition of the death sentence based on the sole

aggravating circumstance quoted above while at the same time rule that there was no record evidence supporting the requested lesser. offense instruction. The same theory and evidence go toward both the aggravating circumstance instruction and the lesser offense instruction.

[S]tates cannot fairly employ critical evidence to gain their own ends and, at the same time, deny its probative use to defendants. Nor can they fairly profess to doubt the sufficiency of evidence and then assert, in the same breath, that it can be found adequate to support imposition of the ultimate sanction.

Brief for Petitioner-Appellant at 22. As Justice Brennan once wrote, "The Government cannot have it both ways in the same case." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 195 (1963) (Brennan, J., concurring).

Finally, the cases cited by the majority are not persuasive. In Hopper v. Evans, 456 U.S. 605 (1982), the defendant was released on parole and, according to his own testimony, embarked on a two month, cross-country crime spree, committing about thirty armed robberies, nine kidnappings, and two extortions in seven states. During a robbery of a pawnshop, the owner dropped to his hands and knees and crawled toward his office when the defendant shot him in the back, killing him. After capture, the defendant signed a written confession admitting everything. He testified before the grand jury and confessed "that [the victim] was not the only person he had ever killed, that he felt no remorse because of that murder, that he would

kill again in similar circumstances, and that he intended to return to a life of crime if he was ever freed." Id. at 607. He requested before the grand jury that he be executed as soon as possible.

Because Alabama law required a jury trial as a prerequisite for the imposition of the death penalty, the prosecutor rejected defendant's guilty plea. Against his attorney's advice, defendant . testified during his subsequent trial, admitting everything as before the grand jury and stating, "I would rather die by electrocution than spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State." Id. at 607-08. The jury returned a guilty

verdict in less than fifteen minutes, and the defendant was sentenced to death.

Only after defendant's mother initiated habeas proceedings did defendant change his attitude of desiring execution. The Alabama statute under which he was sentenced to death was the same that was shortly thereafter found unconstitutional in Beck v. Alabama because it absolutely precluded jury consideration of any lesser included offense in a capital case--even if warranted by the evidence. Mr. Hopper did not claim that there was record evidence supporting a lesser offense instruction and that he was therefore prejudiced. Rather, he asserted that because the statute was unconstitutional on its

face, his conviction must be automatically set aside.

The Supreme Court ruled against Mr. Hopper, stating that Beck held only that "due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction." Id. at 611. The statute under which defendant was convicted required an intent to kill. The lesser offense that he asserted should have been considered by the jury applied only when a defendant lacked an intent to kill. The defendant's testimony absolutely precluded a conclusion that the murder committed was unintentional as opposed to intentional, and there was no evidence from any other source conflicting with

the defendant's testimony and supporting a lesser offense instruction.

The unusual and particularly one-sided record in Hopper is distinguishable, as the rather elaborate recitation of the facts above indicates, from the present record. In this case, the defendant's proffered testimony did not support the lesser offense instruction, but his testimony (taped telephone conversations) proffered by the state was sufficient evidence contradicting such testimony to warrant the instruction. Hopper was not decided on the basis that the defendant himself failed to come forward with evidence supporting a lesser offense instruction. It does not stand for the proposition that such evidence must come from the defendant.

Rather, it stands for the proposition that when no evidence supports such an instruction, one need not be given just because the case is a capital case.

Spaziano v. Florida, 468 U.S. 447 (1984), is equally inapposite. No lesser offense instruction was required in that case because as a matter of law there was no lesser offense on which to instruct. The statute of limitations had run on the lesser offense. The court did not rule that there was no factual basis in the record to support a lesser offense instruction.

IV.

The Supreme Court "has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of

scrutiny of the capital sentencing determination.'" Caldwell, 472 U.S. at 329 (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)). In my view, exacting scrutiny of the issues embraced in sections I and II of this dissent--issues which directly impacted upon the capital sentencing determination--require vacation of the death sentence in this case. Furthermore, due process requires that defendant's conviction for first degree murder be reversed. On retrial, the evidence shows he is entitled to a lesser offense instruction for second degree murder.

ORDER ON REHEARING EN BANC
WITH ATTACHMENT 1
(REVISED SECTION V AND
ATTACHMENT 2)

(OPINION OF JUDGE BALDOCK
ON PETITION FOR REHEARING)

MARCH TERM - March 1, 1988

Before the Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymoure, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock Circuit Judges.

ROBYN LEROY PARKS)	
)	
Petitioner-Appellant)	No. 86-1400
)	
JOHN N. BROWN, Warden,)	
Oklahoma State Peniten-)	
tiary, McAlester, Okla.;)	
LARRY MEACHUM, Superin-)	
tendent, Oklahoma Dept.)	
of Corrections; and)	
MICHAEL C. TURPEN,)	
Attorney General of)	
Oklahoma,)	
)	
Respondents-Appellees.))	

This matter comes on for considera-
tion of petitioner-appellant's petition
for rehearing and suggestion for
rehearing en banc. The majority

opinion and Judge McKay's partial concurrence and partial dissent were filed on July 15, 1987, and appeared in the advance sheet of 823 F.2d at 1405-29. The opinion was withdrawn from the bound volume pending the Court's further order on petitioner-appellant's petition for rehearing and suggestion for rehearing en banc.

The panel unanimously substitutes a revised "Section V" for the original "Section V" in the panel opinion filed July 15, 1987. Revised "Section V" is attached to this order. (See Attachment 1). With the original opinion thus modified, the panel majority votes to deny the petition for rehearing. Judges McWilliams and Baldock vote to deny the petition for rehearing while Judge McKay votes to grant the petition

for rehearing. Judge Baldock's vote to deny the petition for rehearing is accompanied by his partial explanation which is attached to this order. (See Attachment 2).

The suggestion for rehearing en banc has received the votes of a majority of the judges of the court in regular active service insofar as argument I contained in petitioner-appellant's petition for rehearing. Petitioner-Appellant's Petition for Rehearing with Suggestion for Rehearing En Banc at iv. On all other issues contained in the petition, the suggestion for rehearing en banc has failed to receive the votes of the majority of the judges of the court in regular active service. Briefs should be submitted concerning the following issues:

1. Whether the prosecutor's summation in the penalty phase concerning juror responsibility diverted the jury from considering the full extent of its responsibility for determining the life or death sentence?

2. Whether the penalty phase instruction "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence," influenced the jury to improperly discount mitigating evidence presented by the defendant?

3. Whether the combination of the prosecutor's comments ("You leave the sympathy, and the sentiment and prejudice part out of it.") concern-

ing the above instruction and the instruction itself, and the absence of any corrective instruction after the arguments under 22 Okla. Stat. Ann. tit. 22, § 831(6) (West 1986), influenced the jury to improperly discount mitigating evidence presented by the defendant?

The briefs shall be served and filed as follows:

1. Appellant's opening brief shall be served and filed within 20 days of the date of this order.

2. Appellees' answer brief shall be served and filed within 20 days of the date of service of Appellants' brief.

3. Appellant may serve and file a reply brief within 10 days of

the date of service of Appellees' answer brief.

4. All briefs shall be filed and served in person or by an overnight delivery service. Fed. R. App. Proc. 26(c) shall not be applicable.

Oral argument shall be heard at the May 1988 Term of Court on Thursday, May 5, 1988.

ATTACHMENT 1

86-1400 - Parks v. Brown Revised
Section V).

V. Incomplete and Misleading Instructions On Aggravating Circumstances Vis-a-vis Mitigating Circumstances

Instruction No. 7 given the jury, without objection, in the penalty-phase proceeding reads as follows:

In the event you find unanimously that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be

authorized to consider imposing a sentence of death.

If you do not find unanimously beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death, and the sentence would be imprisonment for life.

Even if you find unanimously one or more of the aggravating circumstances existed beyond a reasonable doubt, and if you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstance, then and in such event the death penalty shall not be imposed, and the sentence would be imprisonment for life.

On appeal, Parks asserts that the foregoing instruction is constitutionally defective in three particulars: (1) the instruction failed to instruct the jury that even if it found that the aggravating circumstances outweighed the mitigating circumstances it could still impose a life sentence and, that

the charge instructed the jury, inferentially at least, that if it found that the aggravating circumstances outweighed the mitigating circumstances it must impose the death penalty; (2) it improperly places a burden on the defendant of proving that mitigating circumstances outweigh the aggravating circumstances; and (3) it fails to adequately define the nature and function of mitigating circumstances. We do not agree.

Under the instruction set forth above, and in accord with Oklahoma statutory and case law, the jury was instructed that it must impose a life sentence unless it unanimously found beyond a reasonable doubt that one or more of the aggravating circumstances alleged by the state existed. Parks'

counsel does not object to this statement. The instruction goes on to advise the jury that even if it should find beyond a reasonable doubt the existence of one or more of the aggravating circumstances relied on by the state, it must still impose only a life sentence if it should further find that the aggravating circumstances are outweighed by the mitigating circumstances,. Again, counsel has no objection to that part of the instruction. As indicated, what counsel does object to is that the instruction did not go further and instruct the jury, in just so many words, that even if it found that aggravating circumstances outweighed any mitigating circumstances, it could, in its discretion, still fix the penalty at life imprisonment.

Such an instruction is not required under Oklahoma law. Nor is such, in our view, required by the Eighth and Fourteenth Amendments.

The first paragraph in the challenged instruction states that the jury is "authorized to consider imposing a sentence of death" if it finds unanimously that one or more of the statutory aggravating circumstances existed beyond a reasonable doubt. The second paragraph in the instruction is the reverse of the first paragraph, and instructs the jury that they are not authorized to consider the penalty of death if they do not find unanimously that one or more of the statutory aggravating circumstances existed beyond a reasonable doubt. The third paragraph in the instruction instructs

the jury that the death penalty cannot be imposed even if they find unanimously one or more of the statutory aggravating circumstances existed beyond a reasonable doubt, if the jury further finds that such aggravating circumstance, or circumstances, is, or are, outweighed by a further finding of one or more mitigating circumstances. The first paragraph speaks in terms of "authorized to consider" the death penalty, and is not directory in its terms. We think the instruction adequately advised the jury on this particular matter.

In *Burrows v. State*, 640 P.2d 533, 544 (Okla.Cr. 1982), the Oklahoma Court of Criminal Appeals was faced with the same argument made here. In rejecting

that argument, the Court spoke as follows:

The defendant's twenty-first assignment of error is, in part, identical to the argument presented in our recent decision of Irvin v. State, 617 P.2d 588 (Okla. Cr. 1980). Arguing from Laws 1976, 1st Extraordinary Session, Chapter 1, Section 5, now 21 O.S. Supp. 1980, § 701.11, defendant claims that the jurors must be told four things prior to beginning deliberations. First, the death penalty cannot be imposed unless the jury finds one or more aggravating circumstances beyond a reasonable doubt; second, if the jury finds one or more aggravating circumstances, then they may consider imposing the death penalty; third, if the jury finds one or more aggravating circumstances, but the circumstances are outweighed by mitigating circumstances of the case, the jury cannot impose the death penalty; fourth, even if the jury finds aggravating circumstances, and those circumstances are not outweighed by mitigating circumstances, they can decline to impose the death penalty. In the defendant's case, the jury was given the first three instructions but not the fourth. As in Irvin, the argument is rejected. The fourth instruction was subsumed in the second, since the jurors were told that they could, not that they had to, impose the death sentence. As stated in Irvin:

The only discretion provided the jury under the statute [21 O.S. Supp. 1980, § 701.11] is that necessary to make a factual finding of the existence or non-existence of aggravating and mitigating circumstances, as well as the discretion requisite in balancing the two.

We do not read the instruction set forth above as casting any burden of proof on the defendant. Under that instruction, the jury first had the responsibility of determining whether the state had proved beyond a reasonable doubt any of the aggravating circumstances set forth in its Bill of Particulars. If the jury so found, then, and only then, was it to "weigh" the aggravating circumstance thus found against the mitigating circumstances

in the case. This, to us, is not a burden of proof matter.¹

Further, in our view, the jury was adequately instructed on the nature and function of mitigating circumstances. Instruction No. 6 identified eight "mitigating circumstances," and advised

¹ The Supreme Court has stated that "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant v. Stephens*, 462 U.S. 862, 875 n. 13 (1983). In *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986), also a death penalty case, we recently observed that "sentencing authorities may determine a defendant's fate without regard for burdens of proof or other measures of certainty." 802 F.2d, at 1264. See also *Ford v. Strickland*, 696 F.2d 804, 817-19 (5th Cir. 1983) (opinion of Roney, J.) (burden of proof argument confuses proof of facts and weighing of facts in sentencing; weighing process not a fact susceptible of proof under any standard); *Sonnier v. Maggio*, 720 F.2d 401, 408 (5th Cir. 1983), cert. denied, 465 U.S. 1051 (1984); *Foster v. Strickland*, 707 F.2d 1339, 1345 (11th Cir. 1983).

the jury that it was not limited to such itemization and could consider "other or additional mitigating circumstances, if any, you may find from the evidence to exist in this case."²

² We have examined the cases from other Circuits relied upon by the petitioner, and have determined that they do not support his position. See e.g., *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986) (en banc), cert. denied, ___ U.S. ___, 107 S. Ct. 421 (1986); *Spivey v. Zant*, 661 F.2d 464 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982). In *Peek*, the Eleventh Circuit held that the constitution requires only that there be "no reasonable possibility" that a juror will fail to understand "the meaning and function of mitigating circumstances." 784 F.2d, at 1494. In *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986), we recently stated that sentencing instructions need only instruct the jury that "the law recognizes circumstances which may be considered as extenuating or otherwise reducing a defendant's culpability and hence his punishment." 802 F.2d, at 1264. In the instant case, the state trial judge's instructions on mitigation (continued...)

ATTACHMENT 2

No. 86-1400, Parks v. Brown.

On Petition for Rehearing

BALDOCK, Circuit Judge.

The petition for rehearing largely restates the position of the dissenting member of the panel. Accordingly, there are two points concerning the refusal of the state trial court to instruct on second-degree murder³ which

³ (...continued)

ing circumstances were lengthy and thorough. The jury's attention was clearly focused on the possible existence of mitigating circumstances, and, in Instruction No. 7, the jury was instructed as to its role in the sentencing decision. There is no reasonable possibility that Parks' jury failed to comprehend the nature and function of mitigating circumstances in reaching its decision.

³ Section 1 of the majority opinion entitled "Lesser Included Offense" deals with this issue and we adhere to our original disposition of this issue.

I deem necessary of further comment.

The dissent states:

The majority concludes that defendant's alibi defense precludes any lesser offense instruction, implying that any evidence in the record supporting a lesser offense instruction must come from the defendant to entitle him to the instruction. "Parks testified in his own behalf and denied killing Ibrahim, testifying that he was elsewhere at the time of the homicide. So, there is nothing in defendant's testimony that would justify giving and instruction on second-degree murder." Maj. op. at 9 (emphasis added).

Concurrence and Dissent (hereinafter referred to as the Dissent) at 15 and 16. As a threshold matter, this analysis of the majority opinion is inaccurate because the majority did not conclude that the defendant's alibi defense, by itself, precluded any lesser offense instruction.² We merely remarked that there was nothing in

defendant's testimony which would justify giving a lesser offense instruction.⁴ That is not to say we did not consider the other evidence upon which a lesser included offense instruction might be based. To the contrary, in the very sentence following the one quoted by the dissent, we acknowledged that other evidence and found it insufficient in this case.

The evidence which counsel relies on in advancing the present argument are the statements made by the defendant to Clegg in the two tape-recorded telephone conversations, particularly the first of the two conversations. We do not agree that these statements made by Parks to Clegg required an instruction to the jury on second-degree murder.

² ⁴For such a conclusion see Briley v. Bass, 742 F.2d 155, 164 n.9 (4th Cir.), cert. denied, 469 U.S. 893 (1984).

Majority Opinion at 9. Thus, we did not purport to adopt a rule, either directly or by implication, which would require a defendant to testify in order to receive a lesser offense instruction.

In this case, as in others, the test is one of sufficiency of the evidence to warrant such an instruction: "the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationaly to find him guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973) (emphasis added). The purpose of constitutionally requiring a lesser offense instruction when the evidence so warrants is to enhance the rationality and reliability of the

jury's deliberations. Spaziano v. Florida, 468 U.S. 447, 455 (1984). If, after viewing the evidence in its entirety, there is insufficient evidence to warrant a lesser offense instruction, the defendant would not be entitled to such an instruction because the lesser offense option would diminish, rather than augment, the rationality of the jury process. See id.

Thus, I cannot agree with the dissent's characterization of our holding on this issue. I fail to see how any reading of the majority opinion would permit an implication that in order for there to be an instruction on a lesser included offense, testimony requiring such an instruction must come from the

defendant himself. Further, a defendant may deny participation in a crime and still be entitled to a lesser offense instruction provided the evidence, from whatever source, would enable the jury to rationally convict the defendant of the lesser offense. The evidence in this case simply is insufficient to warrant an instruction on the offense of second-degree murder in the course of committing a credit card felony.

As a preliminary matter, I note the state trial judge's concern about the lack of physical evidence supporting a lesser-offense theory. For example, no credit card or imprinted charge slip was introduced.³ Nor is there any

³ A blank slip with the defendant's license number written at an angle was (continued...)

evidence in the record concerning the rightful owner of such a credit card. This lack of evidence is not surprising, because the defense made a tactical decision to pursue an alibi defense and did not introduce any evidence tending to show that a second-degree murder in the course of possessing a stolen credit card occurred. Neither did the defendant elicit any information from the state's witnesses concerning this theory.

³ 5 (...continued)
introduced into evidence. Rec. vol. V, ct. ex. 17. The slip is entitled "Transmittal of Travel Card Invoices." It is not a credit card charge slip, rather, it is a three-part form whereby a dealer assigns credit card invoices to the oil company for payment. From the columns of figures appearing haphazardly on the front and back of the form, it is apparent that the form was used as a scratch pad, primarily for addition and subtraction of various amounts.

Questioned by his retained counsel, the defendant attempted to convince the jury that he was uninvolved with any credit card transaction, stolen or otherwise:

Mr. Hood: Okay, Now have you ever used a credit card to do any business, any retail business at all?

Defendant: No.

Mr. Hood: Have you ever applied for a credit card?

Defendant: No.

Mr. Hood: Have you ever had one in your possession?

Defendant: No.

Mr. Hood: Have you ever used any other person's credit card to make a purchase?

Defendant: No.

Mr. Hood: All right. When you bought gas, did you pay cash?

Defendant: Yes.

Rec. vol VI, tr. vol. III at 486, 524. Only the defendant's taped statements would possibly furnish the basis for a claim that a lesser offense instruction is warranted; however, a close look at the statements indicates that they are totally consistent with the first-degree murder conviction.

The state's theory was that defendant committed murder with malice aforethought, malice being defined as the "deliberate intention unlawfully to take away the life of a human being" Okla. Stat. tit. 21 § 701.7 (1981). Defendant claims the evidence warranted an instruction on the theory of a second-degree murder, Okla. Stat. tit. 21, § 701.8 (1981), during the commission of the felony of taking or receiving a stolen credit card, Okla.

Stat. tit. 21 § 1550.22 (1981). An important distinction between the state's first-degree theory and the defendant's second-degree theory concerns defendant's state of mind. The defendant's second-degree theory envisions murder without malice aforethought (or unintentional murder) during the commission of the felony of unlawful possession of a credit card. But the defendant's taped statements to informant Clegg do not support such a second-degree theory--to the contrary, these statements are completely consistent with a deliberate killing. Stated another way, the defendant's statements, although they mention a stolen credit card, do not rise to the level of creating a factual dispute concerning whether the murder was

deliberate or unintentional. See Sansone v. United States, 380 U.S. 343, 350 (1965) ("A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.")

I have listened to the tapes and reviewed the transcripts, and where the tapes and transcripts differ, I have relied on the tapes themselves.⁶ In my

⁶ The transcripts of the tapes are not completely accurate as became evident in the trial, rec. vol. VI, tr. vol. III at 492-96. The jury was instructed that the words on the tape prevail. Rec. vol. VI, tr. vol. II at 344-45. Although the words on the tape are not identical to the transcribed version used in the state district court, we do not perceive any material variance. For the sake of accuracy, statements from the tape have been included.

view, only one tape furnishes an arguable basis for a second-degree murder instruction. The defendant told Clegg that the victim was standing straight up when he shot him and that the victim had not sounded any alarm.

The conversation continued:

Defendant: I went there with a credit card, a gas credit card. You see what happened, he come, after I give him the credit card he comes out the booth and comes back and look at my tag number.

Clegg: Uh-huh.

Defendant: So I know then that if he get the tag number, as soon as I leave he gonna call the law.

Clegg: Oh.

Defendant: Alright?

Clegg: Uh-huh.

Defendant: O.K. he gonna call the law, I got them guns, the dynamite and everything in my trunk, right?

Clegg: Yeah, I didn't know that.

Defendant: I ain't gonna get too far before they get on me . . .

Clegg: Uh-huh.

Defendant: So I said the way to do that if he don't be around then ain't nothin he can tell them no way.

Clegg: So you took--

Defendant: I wasn't going there for what people thought it was.

Clegg: Oh, is that right?

Defendant: Right, I was there to use that credit, that gas credit card.

Clegg: Damn boy, boy you somethin' else, you somethin' else man.

Defendant: No, but see, that's what people fail to realize. See if he'd a told on me, see I woulda went anyway. See what I'm sayin'?

Clegg: Yeah.

Defendant: And, I just looked at it I might as well, if I'm go, let me go for being a dumb son of a gun, you know a little funky gas credit card.

Defendant: I didn't take a dime. You know, cause I didn't come there to take no dime, I come there to get me some gas and then when he got my number I said man, if I leave, I say, I won't be two blocks before they be on me cause he goin', he goin' tell it that I got,

you know a hot credit, gas credit card. I say . . .

Clegg: An' you did, I say one thing, you did it without witnesses and I guess that's the way . . .

Defendant: Huh?

Clegg: I guess if you goin' to kill somebody, I guess that's the way to do 'em.

Defendant: Yeah, let you and them be there. You know, you don't need no ten niggers with you to do nothin . . .

Clegg: No.

Defendant: Just you and them and then you ain't got nothin' to worry about.

Rec. vol. V, ct. ex. 39; see also ct. ex. 1 at 2-3, 12. These statements, which were later disclaimed by defendant at trial as complete fabrications,⁵ indicate that the

⁵ At trial, the defendant claimed that he talked to James Clegg by telephone in order to obtain various Oklahoma telephone numbers from him. Rec. vol. VI, tr. vol. III at 475. The defendant said that at the time of the
(continued...)

defendant contemplated the murder. Twice he remarked that he was going to leave the station after using the credit card. His concern was to avoid apprehension after he left the gas station, and to that end he made a calculated decision to kill the attendant. These statements fully support a deliberate murder, notwithstanding that a credit card may have been involved.

The dissent maintains that the jury should have been allowed to determine whether the murder was committed in the

⁵ X (...continued)
taped conversations he "was fully aware that James was the informant on the case." Id. at 476. Defendant testified that the reason for inventing the story on the tape was to shift police attention concerning the homicide away from his family and friends and onto himself. Id. at 477-78.

course of the felony of possessing a stolen credit card and that the majority has invaded the province of the jury by evaluating the evidence and accepting only that evidence tending to support a first-degree murder. Dissent at 17-18. I must disagree with this characterization. I have searched the record and simply have found a lack of evidence from which a jury could rationally conclude that an unintentional murder occurred, even if a credit card was involved.

The dissent also suggests that the determination that defendant was not entitled to a lesser offense instruction on his second-degree murder theory is inconsistent with a penalty phase instruction on the aggravating circumstance of killing to avoid or prevent a

lawful arrest or prosecution. But, the facts needed to suggest second-degree murder are not identical with those suggesting the aggravating circumstance. The state's theory, supported by defendant's own admissions on the tapes, was a deliberate murder to avoid arrest for possession of a stolen credit card, weapons and dynamite. The aggravating circumstance allowing the death penalty was that the murder was committed to avoid or prevent lawful arrest or prosecution. In marked contrast, the second-degree murder theory advanced by defendant envisions a non-deliberate homicide committed during the felony of possessing a stolen credit card. Such a theory was not defendant's account on the taped telephone conversation and it was not

his account at trial. The state did not attempt to "have it both ways in the same case." Dissent at 19 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 195 (1963) (Brennan, J., concurring)). Accordingly, I vote to deny rehearing.

APPENDIX

C

88-1264

FILED

JAN 26 1989

JOSEPH F. SPANOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

ROBYN LEROY PARKS,
Respondent.

APPENDIX C TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA
ROBERT A. NANCE*
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January, 1989
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9702

DISTRICT COURT OPINIONS

MEMORANDUM OPINION AND
ORDER OF JUDGE THOMPSON
NOVEMBER 5, 1985

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

ROBYN LEROY PARKS,)
)
 Petitioner,)
)
 - vs -) No. CIV-84-
) 1618-T
)
JOHN N. BROWN, WARDEN,)
OKLAHOMA STATE PENITEN-)
TIARY, MCALESTER, OKLA-)
HOMA, LARRY MEACHUM,)
SUPERINTENDENT, DEPART-)
MENT OF CORRECTIONS,)
STATE OF OKLAHOMA, and THE ATTORNEY))
GENERAL OF THE STATE OF)
OKLAHOMA,)
)
 Respondents.)

MEMORANDUM OPINION AND ORDER

Petitioner has applied to this court for a writ of habeas corpus, claiming he was unconstitutionally convicted and sentenced to death for First Degree Murder, in Case No. CRF-77-3159, District Court of Oklahoma County, Oklahoma. The decisions as to

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petitioner's guilt and the penalty to be imposed were made by a jury.

The petition contains twelve claims for habeas corpus relief. The issues raised by some of these claims overlap; the number of non-duplicative claims is actually ten. These ten claims are as follows:

(1) Petitioner was denied his right to a fair trial on the question of guilt or innocence, and his right to a jury composed of a representative cross-section of the community, because the trial court "death-qualified" the jury panel (i.e., excused for cause those venirepersons who indicated at voir dire that their scruples against the death penalty would absolutely prevent them from voting to impose it).

(2) The trial court's refusal to instruct the jury on the lesser offense of Second Degree Murder, murder while committing the felony of possessing a stolen credit card, violated petitioner's rights under the 8th and 14th Amendments to the United States Constitution.

(3) The trial court's instruction to the jury that it could not consider "sympathy" for petitioner in its deliberations during the penalty phase of the trial precluded the jury from considering admissible mitigating evidence in violation of petitioner's 8th and 14th Amendment rights.

(4) Prosecutorial misconduct during the penalty phase of the trial violated petitioner's 8th and 14th Amendment rights.

(5) Jury instruction number seven at the penalty phase of the trial instructed the jury to apply the Oklahoma death penalty statutes as mandatory death penalty statutes in violation of petitioner's 8th and 14th Amendment rights.

(6) The requirement of the Oklahoma death penalty statutes that mitigating circumstances must outweigh aggravating circumstances in order for a jury to sentence a defendant to life imprisonment unconstitutionally shifted the burden of proof to petitioner in violation of his 8th and 14th Amendment rights.

(7) The trial court's failure to instruct the jury how to weigh aggravating versus mitigating circumstances

violated petitioner's 8th and 14th Amendment rights.

(8) Racial discrimination in death sentencing practices in Oklahoma and disproportionality between petitioner's sentence and those imposed on other defendants for crimes similar to petitioner's rendered imposition of the death sentence on petitioner arbitrary, in violation of his 8th and 14th Amendment rights.

(9) Petitioner's trial counsel was so ineffective at the penalty phase of the trial as to deprive petitioner of his 6th Amendment right to counsel.

(10) The trial court's admission into evidence of petitioner's conviction at age 17 of robbery by force and fear violated petitioner's 6th, 8th and 14th Amendment rights.

Petitioner has several motions before the court for resolution. The motions and their relationships to the various contentions are as follows:

(1) Petitioner has moved for summary judgment as to all contentions except the first (death-qualified jury), eighth (racial discrimination and disproportionality in Oklahoma death sentencing practices) and ninth (ineffectiveness of trial counsel at penalty phase).

(2) As to the three contentions not included in the motion for summary judgment, petitioner has moved for an evidentiary hearing.

(3) Petitioner has moved the court to appoint experts to assist him in developing support for the contentions

which are not included in the motion for summary judgment.

(4) Petitioner has moved the court to grant him discovery in order to develop evidence regarding his eighth contention, concerning racial discrimination and disproportionality in Oklahoma death sentencing practices.

(5) Finally, unrelated to any particular contention, petitioner has moved the court to appoint additional counsel to assist him in these proceedings.

I
PETITIONER'S ATTACKS ON THE
CONSTITUTIONALITY OF THE
OKLAHOMA DEATH PENALTY STATUTES:
THE THIRD, FIFTH, SIXTH AND
SEVENTH CONTENTIONS

Petitioner's third, fifth, sixth and seventh contentions attack the constitutionality of the Oklahoma death penalty statutes, 21 O.S. §§701.9-

701.12, as the jury at his trial was instructed to apply them.

Petitioner's third contention is that instructing the jury that it could not consider "sympathy" in its deliberations during the penalty phase of his trial prevented the jury from considering admissible evidence in mitigation of his sentence. See generally Eddings v. Oklahoma, 455 U.S. 104 (1982). The challenged instruction, number 9 given at the penalty phase, cautioned the jury:

"You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions."

If the word "sympathy" is considered in isolation, it is conceivable that it

might describe a state of feeling toward petitioner which consideration of admissible mitigating evidence would produce in a juror's mind. Instructions, however, must be read as a whole. See Francis v. Franklin, ____ U.S. ____, 37 Crim. L. Rptr. 3019, 3021 (April 29, 1985); and Cupp v. Naughten, 414 U.S. 141, 147 (1973). When thus placed in context, it is clear that sympathy was to be excluded from the jury's consideration insofar as it was an "arbitrary factor", i.e., one not based upon the evidence. The jury was not to render a decision based upon such arbitrary factors, but was to "return such verdict as the evidence warrants. . . ." In other words, the jury was instructed to reach its verdict "based on reason rather than

caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977), quoted in Zant v. Stephens, 462 U.S. 862, 885 (1983).

In informing the jury it could not consider arbitrary factors in reaching its verdict, the challenged instruction comported precisely with the requirements of the 8th and 14th Amendments. There was no constitutional violation in instructing the jury not to consider "sympathy ... or other arbitrary factor"

Petitioner's fifth contention challenges jury instruction number 7 given at the penalty phase of his trial on the basis that this instruction allegedly required the jury to apply the Oklahoma death penalty statutes as "mandatory" death penalty statutes.

See generally Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976). The gist of petitioner's contention is his allegation that instruction number 7 failed to inform the jury that it had the option to recommend against death even if it found from the evidence that one or more of the statutorily enumerated aggravating circumstances had been established. This allegation is flatly contradicted by the relevant language of instruction number 7:

"Even if you find unanimously one or more of the aggravating circumstances existed beyond a reasonable doubt, and if you further find that such aggravating circumstance or circumstances is (sic) outweighed by the finding of one or more mitigating circumstance (sic), then and in such event the death penalty shall not be imposed, and the sentence would be

imprisonment for life." (Emphasis added.)

Though petitioner never makes the argument explicitly, it appears he may be urging a related contention, that under the Oklahoma death penalty statutes and similar statutes in other states such as Georgia and Florida a jury retains the discretion to render a verdict of life imprisonment even if it finds aggravating circumstances outweigh mitigating circumstances. The cases petitioner cites in support of this argument stand for two propositions: First, that under this type of death penalty statute, a jury may find one or more statutory aggravating circumstances and yet render a verdict of life imprisonment if it finds mitigating circumstances outweigh aggravating circumstances; and second,

that a jury is not limited under this type of statute as to the mitigating factors it may consider, nor is it required to specify which mitigating factors it has considered. No case cited by petitioner supports the proposition that such statutes allow a jury to find from the evidence that aggravating circumstance outweigh mitigating circumstances and then arbitrarily render a verdict for either life imprisonment or death. A death penalty statute which allowed a jury such unfettered sentencing discretion would surely run afoul of Furman, supra. The Oklahoma death penalty statutes do not allow a jury unfettered discretion in sentencing. The jury's discretion is channeled by requiring it to consider and weigh various

aggravating and mitigating circumstances. Neither do the Oklahoma statutes remove from a jury the discretion to make an individualized sentencing determination on the basis of the facts of the particular case before it. See, e.g., jury instruction number 9 given at the penalty phase (referring to the "evidence, facts and circumstances of this case"). (Emphasis added.) Compare Woodson and Roberts, supra.

Jury instruction number 7 given at the penalty phase of petitioner's trial did not unconstitutionally limit the jury's sentencing discretion.

Petitioner's sixth claim for habeas corpus relief is that the requirement that mitigating circumstances must outweigh aggravating circumstances in

order for the jury to render a verdict for life imprisonment unconstitutionally shifted the burden of proof to him.

It is unusual in this nation's various criminal justice systems for a jury to set the penalty for a crime. Usually the jury's role is to determine whether a crime was committed, whether the defendant committed it, and the defendant's degree of culpability, if the statute under which the defendant is charged is one which provides for varying degrees of culpability. In making these determinations, the jury must place the burden of proof on the state and use the familiar "beyond a reasonable doubt" standard in evaluating the evidence. Shifting the burden of proof or holding the state to

a lesser standard of proof violates the constitutional guarantee of due process. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 520, 524 (1979); and Mullaney v. Wilbur, 421 U.S. 684, 699-701 (1975).

Under the death penalty statutes in force in Oklahoma and under similar statutes in other states the jury not only determines whether a crime was committed, whether the defendant committed it, and defendant's degree of culpability; under these statutes, the jury takes on the additional task of determining the appropriate sentence.

Sentencing differs qualitatively from assessing guilt or innocence. The sentencing authority must be permitted to consider any and all information that reasonably might bear on the

proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 35 Crim. L. Rptr. 3242, 3243 (July 3, 1984). This includes information which may not be admissible as evidence at the guilt or innocence phase of trial. United States v. Cuevas-Ramirez, 733 F.2d 731, 732 (10th Cir. 1984). "The imposition of a criminal sentence requires the exercise of discretion by the sentencing [authority], which includes consideration of all mitigating and aggravating circumstances relevant to the sentencing process." Andrus v. Turner, 421 F.2d 290, 292 (10th Cir. 1970).

Evidence submitted at the guilt or innocence phase of trial presents a jury with conflicting versions of

events. The prosecution will submit evidence tending to show guilt or lack of credibility of defense witnesses; the defense, evidence tending to show innocence or lack of credibility of prosecution witnesses. The jury must resolve these conflicts using the appropriate standard of proof. In contrast, evidence of aggravating circumstances does not necessarily conflict with evidence of mitigating circumstances. Compare 21 O.S. §701.12 (aggravating circumstances to be considered in cases where capital punishment may be imposed) with jury instruction number 6 given at the penalty phase of petitioner's trial (minimum mitigating circumstances to be considered). Standards of proof, which instruct a jury how to resolve

conflicts in the evidence, are therefore useless to a jury weighing aggravating and mitigating circumstances in determining an appropriate sentence. Petitioner's contention that the state should have had the burden of proving that aggravating circumstances outweighed mitigating circumstances, presumably according to the "beyond a reasonable doubt" standard, is not only not constitutionally required, it is conceptually unworkable.

The state was required to prove beyond a reasonable doubt every element establishing the offense and petitioner's degree of culpability. See, e.g., jury instruction number 2 given at the guilt or innocence phase of petitioner's trial, and jury

instruction number 7 given at the penalty phase. The jury's verdict was thus based upon a degree of proof which satisfied constitutional requirements. See Mullaney, supra. After reaching its verdict, the jury engaged in a sentencing procedure virtually identical to the Florida procedure upheld as constitutional in Proffitt v. Florida, 428 U.S. 242, 250, 257-58 (1976).

The fact that the jury in petitioner's case was not required to find that aggravating circumstances outweighed mitigating circumstances "beyond a reasonable doubt" did not render unconstitutional imposition of the death sentence upon petitioner.

Petitioner's seventh contention is that the trial court's failure to

explain to the jury how to weigh aggravating versus mitigating circumstances violated petitioner's Eighth and Fourteenth Amendment rights.

This contention shares an intrinsic flaw with petitioner's sixth contention. Both contentions would require the jury to be instructed as to how to weigh aggravating versus mitigating circumstances, presumably by means of a standard of proof instruction. As discussed in connection with petitioner's sixth contention, a standard of proof instruction is unworkable in this context, because proof of mitigating circumstances often will not tend to negate proof of aggravating circumstances, and vice versa.

The only alternative to a general standard of proof instruction would be to assign a specific weight or value to each aggravating and mitigating circumstance, then have the jury simply add values and determine whether there was a greater total value of aggravating or mitigating circumstances. Assignment of a specific weight to each aggravating and mitigating circumstance, however, is not constitutionally required. See Proffitt, supra, 428 U.S. at 257. There is also a practical difficulty with this approach, in that there is no limit to the variety of mitigating circumstances a jury may consider. Thus a legislature which desired to enact a statute which assigned a specific weight to each aggravating and

mitigating circumstance would face the impossible task of determining every conceivable mitigating circumstance. Even if it were possible to enact such a statute, the result would be unconstitutional. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense" Woodson, supra, 428 U.S. at 304. If each aggravating and mitigating circumstance were assigned a specific weight, this would in effect substitute a simple, and arbitrary, arithmetic calculation for the individual consideration of the facts of each case which the Constitution requires.

There appear to be no workable, constitutional alternatives to giving the jury discretion to determine for itself how it will weigh aggravating and mitigating circumstances in each case, and petitioner has suggested none. Moreover, the Supreme Court has held that the Constitution does not require instructing the jury how to balance aggravating and mitigating circumstances. Zant, supra, 462 U.S. at 875-76 n.13, citing Jurek v. Texas, 428 U.S. 262 (1976). There was no constitutional violation in the trial court's failure to instruct the jury at petitioner's trial how to balance aggravating and mitigating circumstances.

II

PETITIONER'S REMAINING CONTENTIONS ON SUMMARY JUDGMENT: THE SECOND, FOURTH AND TENTH CLAIMS.

Petitioner's second claim for habeas corpus relief concerns the trial court's refusal to instruct the jury on the lesser offense of second degree murder, murder while engaged in the felony of possessing a stolen credit card. See 21 O.S. §§701.8(2), 1550.22 and 1550.33(c). In a capital trial, failure to instruct a jury on a lesser offense if such an instruction is supported by the evidence is an error of constitutional dimension. Beck v. Alabama, 447 U.S. 625 (1980). The issue raised by petitioner's second contention is whether the evidence at his trial would have supported an instruction on second degree murder.

Petitioner shot and killed the attendant at a self-service gas station in Oklahoma City in early morning hours. There were no witnesses. The following evidence linked petitioner to the crime:

(1) The bullet which killed the victim was the caliber of ammunition used in a gun petitioner admitted possessing.

(2) The license number of petitioner's car was written on a piece of paper found in the attendant's booth at the service station.

(3) In two tape recorded telephone conversations which were played for the jury at trial, petitioner stated that he had attempted to buy gas with a stolen credit card. He had seen the attendant writing down his license

number. Feeling that the attendant might call the police, and not wanting to go to jail for possessing a stolen credit card, petitioner decided to kill the attendant, thus eliminating the only witness to the crime. Petitioner also described the location where he had hidden the murder weapon; the weapon subsequently was found at that location.

No credit card, receipt or other indications that a credit card was connected with the murder were ever found.

Based on this evidence, particularly the tape recorded telephone conversations, the jury found petitioner guilty of premeditated murder, and also found one aggravating circumstance: that petitioner had committed the

murder for the purpose of avoiding or preventing a lawful arrest or prosecution.

The trial court initially refused a second degree murder instruction on the basis that there was no evidence as to how much had been charged on the stolen card, so the court could not determine whether to instruct on manslaughter (homicide while committing petit larceny, a misdemeanor) or second degree murder. This was clearly not a proper basis for refusal to give the requested instruction. See Gilbreath State, 555 P.2d 69 (Okla. Cr. 1976).

Prior to instructing the jury, the trial court changed its reasoning, this time refusing to instruct on second degree murder on the basis that there was no corpus delicti of the underlying

felony. In other words, the trial court reasoned that there was insufficient evidence to show that petitioner had ever committed the crime of possessing a stolen credit card. The Oklahoma Court of Criminal Appeals followed this reasoning in affirming the trial court.

While in agreement with the result reached, this court cannot adopt the reasoning of either the trial or appellate court on this issue. First, it is irrelevant whether sufficient evidence exists to establish a corpus delicti where the issue is failure to give an instruction. Oklahoma law requires giving a lesser-offense instruction unless the evidence is so conclusive as to disallow a reasonable jury from finding the lesser crime.

Gilbreath, supra, 555 P.2d at 70 and cases cited therein. Second, and more important, the evidence introduced at petitioner's trial could not have been on the one hand insufficient to establish a corpus delicti, but on the other hand sufficient to allow submission to the jury, and to support the jury finding, of the aggravating circumstance that the murder was committed to avoid or prevent a lawful arrest or prosecution. See Oats v. State, 446 So.2d 90 (Fla. 1984) (proof of intent to avoid lawful arrest must be very strong when victim is not a police officer). But see Leatherwood v. State, 435 So.2d 645 (Miss. 1983), (refusing to adopt strict Florida standard), cert. denied, Leatherwood v. Mississippi, ____ U.S. ____, 104

S.Ct. 1455 (1984). In petitioner's case the only evidence as to this aggravating circumstance came from the same source as the evidence that petitioner possessed a stolen credit card - the tape recorded telephone conversations. If those tape recordings alone were sufficient to show petitioner committed murder to avoid arrest or prosecution for possessing a stolen credit card, then they were sufficient to show petitioner possessed a stolen credit card.

In this proceeding respondents advance yet another argument in support of the trial court's ruling. Respondents contend there was an insufficient "nexus," or connection, between the felony (possession of a

stolen credit card) and the murder to support a second degree felony murder charge.

Oklahoma has adopted an extremely broad definition of felony murder. For example, in Wade v. State, 581 P.2d 914 (Okla. Cr. 1978), a conviction of felony murder was upheld where defendant shot and killed another patron in a bar. The underlying felony was possession of a firearm in a drinking establishment. It is clear from Wade that no proximate cause relationship between the underlying felony and the murder is required to support a charge of felony murder. In Clark v. State, 558 P.2d 674 (Okla. Cr. 1977), defendants robbed a bank and took hostages. Miles from the scene of the crime and unpursued,

defendants shot a hostage to avoid detection and implement their escape. The Oklahoma Court of Criminal Appeals held there was a sufficient nexus between the bank robbery and the murder of the hostage to support a felony murder conviction. Petitioner committed murder in order to escape apprehension for the underlying felony just as the defendants in Clark did, and the murder petitioner committed was connected more closely with the underlying felony in time and place than was the case in Clark. Petitioner's possession of a stolen credit card had a sufficient nexus with the murder he committed to support a charge of, or instruction on, felony murder under Oklahoma law.

Yet the trial court's refusal to give a second degree murder

instruction was not erroneous. In Palmer v. State, 327 P.2d 722 (Okla. Cr. 1958), defendant, who had been convicted of leaving the scene of a personal injury accident, a felony, challenged the trial court's refusal to instruct on leaving the scene of an accident causing property damage, a misdemeanor. The Oklahoma Court of Criminal Appeals upheld the trial court on the ground that the evidence was insufficient to raise the issue of whether defendant was guilty of the lesser offense. The same evidence which established a collision causing property damage also established that personal injury had occurred. In petitioner's case, the only evidence of the felony of possessing a stolen credit card was the two taped telephone

conversations. The same evidence also established premeditation. There was no evidence in the case from which the jury could have found petitioner guilty of second degree murder only. The Oklahoma rule barring a lesser-offense instruction under these circumstances is identical to the federal rule, see Keeble v. U.S., 412 U.S. 205, 208 (1973), and does not offend federal constitutional standards. Hopper v. Evans, 456 U.S. 605 (1982).

Petitioner's fourth contention is that overzealous argument by the prosecutor in his summation to the jury at the penalty phase of trial made the penalty phase hearing fundamentally unfair to petitioner in violation of his Eighth and Fourteenth Amendment rights.

Respondents do not argue that the prosecutor's comments were unobjectionable. Several of the prosecutor's comments during his summation were clearly improper. Such conduct cannot be condoned. See Whittington v. Estelle, 704 F.2d 1418, 1421 (5th Cir. 1983). Whether this improper conduct resulted in denial of petitioner's constitutional rights, however, depends upon whether the penalty phase hearing was thereby rendered fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

At the penalty phase of petitioner's trial, the jury was instructed to consider three aggravating circumstances: (1) The murder was especially heinous, atrocious or cruel; (2) The

murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; (3) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found only one aggravating circumstance, that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. It would have been incongruous for the jury not to have found this aggravating circumstance, since it had already found petitioner guilty, and by far the strongest evidence of guilt was the two taped telephone conversations in which petitioner stated he committed the murder to avoid arrest or prosecution for possessing a stolen credit card.

In spite of the prosecutor's comments, the jury refused to find that the murder was especially heinous, atrocious or cruel, or that petitioner would present a continuing threat to society. This does not bespeak a jury which had had its passions so inflamed against petitioner that it could not judge him fairly.

The thrust of petitioner's mitigating evidence was that he was the child of divorced parents, and had little parental supervision during his upbringing. Yet, though the mitigating evidence was rather weak, and the evidence was very strong as to the one aggravating circumstance the jury did find, the jury deliberated for several hours before reaching its sentencing decision.

In view of the foregoing it is evident that the jury was not inflamed by the prosecutor's comments, but rather carefully and fairly discharged its responsibility to determine the appropriate sentence. While the prosecutor's conduct was improper, it did not result in deprivation of petitioner's constitutional rights.

Petitioner's tenth contention is that the admission into evidence of his earlier conviction, at age 17 for robbery by force and fear, violated his Sixth, Eighth and Fourteenth Amendment rights. The fact of petitioner's conviction was introduced by the direct testimony of petitioner himself.

The court will not treat this as a waiver of petitioner's claim because petitioner had unsuccessfully sought a

ruling from the trial court barring the use in evidence of his prior conviction, so his choice at trial was not whether the fact of his conviction would be admitted, but how.

Petitioner was prosecuted as an adult and convicted of robbery by force and fear at a time when Oklahoma criminal law treated 17-year-old boys as adults and 17-year-old girls as juveniles. The United States Court of Appeals for the Tenth Circuit found this violated the constitutional guarantee of equal protection of the laws. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972). In Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978), the Tenth Circuit declined to void all convictions obtained under the system held

unconstitutional in Lamb; however, the Circuit did hold that such convictions were voidable. Under Bromley, in a post-conviction proceeding to vacate a conviction obtained in violation of the Lamb holding, the burden is on the state to prove the applicant for post-conviction relief would have been certified to stand trial as an adult.

In Edwards v. State, 591 P.2d 313 (Okla. Cr. 1979), the Oklahoma Court of Criminal Appeals held the burden was on the applicant to show entitlement to relief from a conviction rendered voidable by Lamb. At first blush this holding seems to be in direct conflict with Bromley. However, in Fowler v. Alford, 526 F.Supp. 753, 755 (W.D. Okla. 1981), then Chief Judge Daugherty of this court noted that the Edwards

requirement that an applicant for post-conviction relief show his entitlement to same did not shift the burden of proof but was merely a pleading requirement that the applicant state a claim upon which relief could be granted. There was no conflict with Bromley, since Bromley did not require, or intend, that the state present evidence in response to meritless applications for post-conviction relief.

Petitioner's application to vacate his robbery conviction was denied without a hearing by the District Court of Oklahoma County and the denial was affirmed by the Oklahoma Court of Criminal Appeals, again without a hearing. Under Bromley, Edwards and Fowler, supra, this amounted to holding

as a matter of law that petitioner's application for post-conviction relief failed to state a claim upon which relief could be granted. If the state courts erred in this holding, petitioner was entitled to a hearing on his application, and depending upon the outcome of the hearing, petitioner's prior conviction may have been unconstitutionally obtained. If it was, its admission into evidence at petitioner's murder trial could consequently have been violative of petitioner's due process rights. See Loper v. Beto, 405 U.S. 473 (1972).

It is unnecessary for this court to decide whether petitioner's application in state court for post-conviction relief stated a claim upon which relief could be granted. Assuming, arguendo,

that admission of the fact of petitioner's prior conviction into evidence was constitutional error, it was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967).

The evidence of petitioner's guilt was extremely strong, and its validity has not been questioned in these proceedings. It consisted primarily of petitioner's tape-recorded conversations admitting guilt and reciting facts, such as the hiding place of the murder weapon, which would have been known only to the murderer. Petitioner's prior conviction predated the murder trial by several years and was not for a similar crime. In this court's view, considering the overwhelming evidence of guilt, there

is no reasonable probability that evidence of petitioner's prior conviction contributed to his conviction for murder. Chapman, supra. At the penalty stage of the trial, the jury was informed that petitioner's prior conviction resulted from an incident in which petitioner and two other high school students punched and kicked a classmate in the school yard and stole six cents from him. There was only one aggravating circumstance to which the prior conviction was relevant, the probability that defendant would commit further violent criminal acts that would constitute a continuing threat to society. The jury failed to find this aggravating circumstance, and thus there is no reasonable probability that evidence of

petitioner's prior conviction contributed to the sentence imposed on him. Id.

Admission into evidence of petitioner's conviction at age 17 of robbery by force and fear did not violate his constitutional rights.

III DISPOSITION OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner has demonstrated no abridgement of his constitutional rights and therefore no entitlement to habeas corpus relief as to any of the contentions he urges on his motion for summary judgment. That motion is hereby denied. As petitioner's filing of the motion for summary judgment necessarily implies, these contentions are not subject to further factual

development. Because petitioner can prove no set of facts in support of these contentions which would entitle him to relief, see Conley v.

Gibson, 355 U.S. 41, 45-46 (1957), and Bennett v. Passic, 545 F.2d 1260 (10th Cir. 1976), petitioner's second, third, fourth, fifth, sixth, seventh and tenth claims for habeas corpus relief must be and are hereby dismissed. (The claims are referred to as they are numbered at the beginning of this opinion, see pp. 1-3, supra, not as they appear in petitioner's application for writ.)

IV

PETITIONER'S REQUEST FOR AN ~~THE~~ FIRST, EIGHTH AND NINTH CONTENTIONS

Petitioner's first claim for habeas corpus relief herein is that his right under the Due Process Clause of the Fourteenth Amendment, to a fair trial on the question of guilt or innocence, cf. Witherspoon v. Illinois, 381 U.S. 510, 518 (1968), and his right under the Sixth Amendment, to a jury composed of a representative cross-section of the community, see Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979), were denied when the jury panel was death-qualified by the trial court. Six of the twenty three venirepersons were excused from serving on the jury at petitioner's trial because they indicated that their scruples against the death penalty would absolutely prevent them from voting to impose it.

The Courts of Appeals which have decided the issues raised in petitioner's first claim have reached conflicting results. The Fourth, Fifth and Eleventh circuits have rejected petitioner's position, while the Eighth circuit has accepted it.

Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984); Spinklellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); Smith v. Balkcom, 660 F.2d 573 575-84 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B 1981) [Unit B of the Fifth Circuit later became the Eleventh Circuit], cert. denied, 459 U.S. 882 (1982) ; and Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom.

Lockhart v. McCree, _____ U.S.____, 54 U.S.L.W. 3223 (Oct. 7, 1985).

In each of the cited cases, the district court took evidence of attitudinal surveys and mock trial studies which were introduced by petitioners seeking to show that death-qualified jurors were more prosecution-prone and that persons excluded pursuant to Witherspoon were more defense-prone. In Keeten, particularly, it was noted that the state contended that the studies were flawed and that the petitioner's own statistics showed the minimal impact of conviction-prone differences except that opposition to the death penalty strongly increased the likelihood of juror nullification; i.e., the inclination of a juror so strongly

opposed to the death penalty that he will refuse to convict irrespective of the evidence if the death penalty can be imposed as a result of the conviction.

In Keeten, the trial court held in favor of the petitioner, finding that Witherspoon-excluded jurors are a distinctive group within the community whose exclusion violates the Sixth Amendment guarantee that the jury panel be drawn from a fair cross-section of the community (citing Taylor) and that their exclusion created a conviction-prone jury, thus denying petitioner due process. The state appealed and the Court of Appeals for the Fourth Circuit reversed. The appellate court, citing Lockett v. Ohio, 438 U.S. 586, 596-597, stated that although the right to

trial by jury includes the right to a jury venire drawn from a representative cross-section of the community, it does not include the right to be tried by jurors who are unwilling or unable to follow the law and the instructions of the trial judge in a capital case. The appellate court further concluded that jurors who were irrevocably opposed to capital punishment would not be impartial factfinders, and would engage in jury nullification in violation of their oaths. Finally, it was stated that due process did not guarantee a defendant a jury more likely to find him innocent than guilty, but only an impartial jury.

In Balkcom, the court quoted Spinkellink as follows:

"That a death-qualified jury is more likely to convict than a

nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant."

The court then concluded that neither the state nor the defendant is entitled to an unfair juror.

The courts in Keeten, Spinkellink and Balkcom, assumed the validity and persuasiveness of the attitudinal surveys, mock trial studies and other evidence presented by petitioners, but rejected the conclusion sought as a matter of law. Petitioner herein has made a showing of the proof he would offer at an evidentiary hearing in support of his position, consisting of much of the same information which was presented and considered in Keeten, Spinkellink, Balkcom, and in Grigsby.

In Grigsby, the nine judges of the Eighth Circuit, in a 5-4 decision, accepted petitioner's contentions on both the Sixth and Fourteenth Amendment grounds. The action was an appeal from the granting of habeas corpus relief at the district court level, in favor of a prisoner sentenced in the courts of the State of Arkansas.

It is noted that under Arkansas law, both the guilt and innocence and the penalty portions of a capital trial are held in the same proceeding, as opposed to the separate bifurcated proceedings required under Oklahoma law.

The dissent in Grigsby first questions the majority's extension of Taylor's cross-sectional requirement to individual petit juries as well as to venires or panels. Next it questions

the majority's analysis leading to the Sixth Amendment determination, particularly the recognition of attitudinal and opinion evidence as sufficient to create a distinctive group, by noting that: "Attitudes and opinions, unlike the characteristics that underlie recognized cross-sectional groups, may change rapidly, whimsically, and without objective manifestation." Grigsby, supra, 758 F.2d at 245. Finally, the dissent notes that three different panels of circuit courts have unanimously concluded that as a matter of law Withersnoon exclusions do not fail to produce impartial juries, citing Keeten, Balkcom and Spinkellink, and that the majority cites as precedent

only the overruled district court opinion in Keeten.

This court has reviewed the conflicting decisions, is persuaded by and hereby adopts the reasoning in Keeten, Balkcom and Spinkellink and in the dissent in Grigsby. The court therefore holds that as a matter of law petitioner is not entitled to habeas corpus relief upon his first claim, assuming arguendo the validity and persuasiveness of the proof sought to be offered by petitioner at an evidentiary hearing. Thus, no evidentiary hearing is necessary on this issue and petitioner's request for the same is denied. Similarly his request for the appointment of experts as to this issue is likewise denied.

Petitioner's eighth contention is that racial discrimination in death sentencing in Oklahoma and disproportionality between petitioner's sentence and those imposed on other defendants for crimes similar to petitioner's rendered imposition of the death sentence on petitioner arbitrary, in violation of his 8th and 14th Amendment rights.

This contention is directed toward two types of arbitrariness: racial discrimination in death sentencing, which is arbitrary because sentencing determinations rest on a factor, race, that is not part of the evidence in the case; and disproportionality in death sentencing, which is an indication of sentencing determinations which are arbitrary in the sense of being random,

i.e., the sentencing discretion of juries is not being effectively channeled. Death sentencing determinations which were arbitrary in either sense would violate the constitutional guarantee of due process and the constitutional prohibition against cruel and unusual punishment. See Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

Regarding racial discrimination in Oklahoma death sentencing practices, petitioner has proffered a statistical analysis of racial disparities in capital sentencing, published as Gross and Mauro, Patterns of Death, 37 Stanford L. Rev. 27 (1984). The authors found that the race of the victim had a statistically significant

effect on whether an Oklahoma murder suspect received a death sentence, this being far more likely if the victim was white. Patterns of Death, supra, p.96. The race of the suspect had no statistically significant effect on the likelihood that the death sentence would be imposed by an Oklahoma jury. Id. at p.97 n. 187.

Surprisingly, petitioner and respondents disagree as to the race of the murder victim. Petitioner contends the victim was white, while respondents maintain he was black. In reality, the victim was a dark-complected, Caucasoid citizen of Bangladesh, named Abdullah Ibrahim, and thus he does not fit comfortably in either of the two race-of-victim categories (white and black) used in petitioner's proffered

statistical analysis. Patterns of Death notes several studies which have been performed in an attempt to explain race-of-victim effects on capital sentencing. Id. at pp. 106-110. None of the factors which these studies found to arbitrarily increase the probability that capital punishment would be imposed was present in petitioner's case. Thus the evidence petitioner himself has proffered indicates that the death sentence imposed on him was not tainted by racial discrimination.

The scope of the underlying data used to produce the analysis contained in Patterns of Death is very thorough. Data regarding every homicide reported in Oklahoma during a five-year period was used to produce the Oklahoma

statistics. Id. at pp. 49-54. Significantly, this five-year period includes the dates of petitioner's crime and trial. The court is left with no doubt that petitioner would be unable to prove that racial discrimination caused the jury in his case to arbitrarily impose the death sentence. The request for evidentiary hearing is therefore denied as to the racial discrimination issue.

For the same reason, petitioner's eighth claim for habeas corpus relief is dismissed insofar as it is based on racial discrimination. See Conley v. Gibson and Bennett v. Passic, supra. By reason of the foregoing; and for the additional reason that petitioner is not entitled to expert assistance unless he has made a showing in support

of his claim, Ake v. Oklahoma, 470 U.S. ___, 36 Crim. L. Rptr. 3159 (Feb. 26, 1985) [here the showing contradicts the claim], petitioner's motion for appointment of experts is also denied as it relates to the issue of racial discrimination. Petitioner's request for discovery on this issue is also denied because good cause for granting discovery cannot be shown in view of dismissal of the underlying claim and the fact that the scope of petitioner's proffered statistical analysis is so thorough as to effectively preclude the possibility that petitioner would be able to discover new data which would lead to a different result. Rule 6(a), Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A., fol. §2254.

The other half of petitioner's eighth contention involves arbitrariness as shown by alleged disproportionality between the sentence meted out to petitioner and those imposed on defendants in other capital cases involving similar circumstances. Petitioner's disproportionality argument concentrates on the number and type of aggravating circumstances found in other cases, as opposed to the one aggravating circumstance, murder to avoid lawful arrest or prosecution, found in his case. Petitioner maintains that no other Oklahoma defendant has had a death sentence imposed on him upon a finding of this aggravating circumstance alone.

Whether or not it is true that petitioner is the only defendant in

Oklahoma to receive a death sentence upon a finding of this particular aggravating circumstance alone, his argument misses the point. Disproportionality in sentencing indicates that sentencing may not have comported with constitutional requirements, because the jury may have taken into account arbitrary factors outside the evidence, such as race; or because the jury may not have had adequate strictures placed upon its discretion to prevent "wanton and freakish" imposition of the death penalty. Furman, supra. The jury in petitioner's case was adequately instructed as to the restrictions on its sentencing discretion and returned a verdict in compliance with those instructions. And far from showing the kind of unreasoning hostility toward

petitioner which consideration of impermissible factors outside the evidence might be expected to produce, the jury in petitioner's case rejected two of three proposed aggravating circumstances, finding only the aggravating circumstance which the evidence in the case overwhelmingly supported.

There was no constitutional infirmity in imposing the death penalty upon a finding of only one aggravating circumstance. See, e.g., Zant v. Stephens, supra. Nor was the particular aggravating circumstance the jury found an impermissible basis for a death sentence, since this aggravating circumstance appears in statutes which have heretofore passed constitutional

muster. See, e.g., Proffitt v. Florida, supra.

This court has undertaken to research Oklahoma homicide cases in which the facts and circumstances are similar to those of petitioner's case, and has determined that it is not unusual for a jury to find that a sentence of death was appropriate in such a case; in fact, the death sentence appears to have been imposed in the majority of such cases. See Hays v. State, 617 P.2d 223 (Okla. Cr. 1980), and cases cited therein at 232 n.2.

Petitioner's argument that he is the only Oklahoma defendant to be sentenced to death based solely upon a finding of the aggravating circumstance of murder to avoid lawful arrest or prosecution

must fail as a matter of law. Even if true, such would not establish that the death penalty was unconstitutionally imposed on petitioner. The court's review of other Oklahoma homicide cases with facts and circumstances similar to petitioner's establishes that the death sentence petitioner received was not disproportionate. Therefore the balance of petitioner's eighth contention must be and is hereby dismissed. Petitioner's request for evidentiary hearing, motion for appointment of experts and request for discovery are denied as to this issue for the same reasons said motion and requests were denied in connection with the racial discrimination claim.

Petitioner's ninth contention is that his counsel was so ineffective at

the sentencing stage of the trial as to deprive petitioner of his Sixth Amendment rights. Petitioner alleges that there were witnesses who would have provided mitigating evidence on his behalf who were not called by counsel. Petitioner further alleges that counsel's failure to call these witnesses resulted not from strategic decision-making but from counsel's failure to make a conscientious investigation of available mitigating evidence.

Petitioner's allegations raise a question of fact, inasmuch as the court has not been informed what mitigating evidence petitioner's trial counsel, who is now deceased, allegedly failed to investigate. As a result, it cannot be said as a matter of law that

irrespective of the nature or extent of the mitigating evidence, there is no reasonable probability it would have changed the outcome of the sentencing phase of petitioner's trial. See Strickland v. Washington, 52 U.S.L.W. 4564 (May 14, 1984). However, while petitioner has raised a question of fact, he has made no showing whatever of the evidence he would offer on this issue, and the court therefore cannot presently determine whether a hearing would serve any purpose. Additional inquiry must therefore be made, addressed to the issue of the nature and extent of the evidence petitioner is prepared to offer at an evidentiary hearing.. The court will issue interrogatories to petitioner for this purpose. See Sanders v. United States,

373 U.S. 1, 22 (1963); and Reed v. United States, 438 F.2d 1154, 1156 (10th Cir. 1971). Respondents will then be given the opportunity to respond to petitioner's answers to interrogatories. On the basis of the evidence then before it the court will determine whether an evidentiary hearing is warranted.

Petitioner has moved for the appointment of experts to assist him in preparing his claim of ineffective assistance of counsel. The motion is denied for failure to make the requisite showing of need for expert assistance as to this issue. Ake v. Oklahoma, supra.

DISPOSITION OF PETITIONER'S
MOTION FOR APPOINTMENT OF
ADDITIONAL COUNSEL

Petitioner's motion for appointment of additional counsel is denied for two reasons: First, petitioner's present counsel has shown himself able to provide extremely effective assistance to petitioner thus far; and second, in view of the resolution of all but one of petitioner's contentions, the case is considerably less complex than it was at the time the motion was made.

VI

SUMMARY

Petitioner's claims for habeas corpus relief are dismissed, except as to the claim of ineffective assistance of counsel at the penalty stage. Rather than holding an evidentiary

hearing on that claim in the first instance, the court will elicit additional evidence through interrogatories and will then determine whether an evidentiary hearing is warranted. An evidentiary hearing is denied as to the remaining claims upon which a hearing was requested. Petitioner's request for discovery, motion for appointment of experts and motion for appointment of additional counsel are denied.

IT IS SO ORDERED this 5th day of November, 1985.

RALPH G. THOMPSON
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

ROBIN LEROY PARKS,

Petitioner,

-vs-

No. CIV-
84-1618-T

JOHN N. BROWN, WARDEN,
OKLAHOMA STATE PENITENTIARY,
MCALESTER, OKLAHOMA, LARRY
MEACHUM, SUPERINTENDENT,
DEPARTMENT OF CORRECTIONS,
STATE OF OKLAHOMA, and THE
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Respondents.

OPINION AND ORDER
OF JUDGE THOMPSON
FEBRUARY 28, 1986

OPINION AND ORDER

Petitioner has applied to this court for a writ of habeas corpus, claiming he was unconstitutionally convicted and sentenced to death for First Degree Murder in CRF-77-3159, District Court of Oklahoma County, Oklahoma. The conviction and sentence of death were

both imposed by a jury. In its previous memorandum opinion and order issued in this cause, the court issued final rulings on all pending motions and all of petitioner's claims for relief except petitioner's claim that his retained counsel had not provided him effective representation at the penalty stage of his trial.

Petitioner alleged that counsel's ineffectiveness consisted in the fact that counsel failed to call witnesses who would have provided mitigating evidence on petitioner's behalf; and that counsel's failure to call these witnesses resulted not from strategic decision-making but from counsel's failure to make a conscientious investigation of available mitigation evidence or witnesses. The court

therefore issued interrogatories to petitioner designed to elicit a showing for petitioner on this issue. Petitioner has filed responses to the court's interrogatories and has recently supplemented those responses. While the court's previous memorandum opinion and order contemplated affording respondents an opportunity to respond to any showing made by petitioner in answer to the court's interrogatories, in part because petitioner's trial counsel is now deceased and thus could not provide the court with an opposing point of view, because of the court's disposition of this matter a response will not be required.

A review of the facts relevant to this issue will be helpful. Petitioner

shot and killed the attendant at a self-service gas station in Oklahoma City. There were no witnesses. Two tape recorded telephone conversations provided the most dramatic evidence against petitioner. James Clegg, an acquaintance of petitioner, made two telephone calls to petitioner from the office of the Oklahoma County District Attorney. Petitioner, of course, was unaware the conversations were being recorded. What follows are portions of the recordings, edited for brevity and clarity:

PETITIONER: I wasn't going there to get no money. I went there with a credit card. He come up, I give him the credit card, he come out the booth to come back and look at the tag number. So I know then that if he get the tag number, as soon as I leave, he gonna call the law.

CLEGG: Uh-huh.

PETITIONER: OK, he gonna call the law, I got them guns, the dynamite and everything in my trunk, right? I ain't going to get too far before they get on me, so I said the way to do that if he don't be around then ain't nothing he can tell them.

CLEGG: You are something else, man.

PETITIONER: But that is what people fail to realize. If he had told on me, I would have went anyway. And I just look at it as, if I go, let me go for being a dumb son of a gun, you know, a little funky gas credit card.

CLEGG: The thing is that that's murder.

PETITIONER: Yeah, but that is what I'm trying to get you to see, ain't no witnesses, so what?

Later, Clegg asked petitioner why he was carrying dynamite in the trunk of his car:

CLEGG: What's the dynamite for?

PETITIONER: I was going to do some damage.

CLEGG: Is that right?

PETITIONER: Oh yeah, remember I told you I was going to get [a man named Cody]. It wouldn't have made no difference as long as he didn't take nothing of mine.

CLEGG: I hear you.

PETITIONER: OK, remember, I had some dope one day and [Cody] took it from [a woman named Neecie]? So I told him, I said hey man, that's mine. But I had never planned to do nothing until he took a ten speed of mine and sold it, told me I owed him fifty dollars for rent.

All of the state's evidence from the first stage of the trial, including the tape recorded telephone conversations, was admitted into evidence at the second stage of the trial. The defense called as its sole witness at the second stage petitioner's father,

Ilanders Parks. Mr. Parks testified that petitioner had not had a stable home situation while growing up, and that petitioner was generally a happy-go-lucky person who got along with everyone. Mr. Parks further testified that though petitioner had lived in a violent neighborhood during the time he was a teenager, he never got into any fights in the neighborhood. Mr. Parks stated that petitioner had been involved in a school yard scuffle his senior year in high school. Mr. Parks was under the impression that race relations and "the busing issue" were factors in provoking the scuffle.

On cross-examination Mr. Parks admitted that he had not stayed in close touch with petitioner for a number of years, and that he was

unaware that petitioner had been convicted of attempted burglary or that he had been dealing extensively in marijuana.

The state presented additional evidence at the second stage of petitioner's trial in the form of testimony from William David Boren, another Party to the "scuffle" in which Petitioner had been involved when he was a senior in high school. Mr. Boren testified that petitioner and others punched and kicked him and took six cents from him.

This factual background is necessary in order to place in context the information contained in petitioner's responses to this court's interrogatories. In response to those interrogatories, petitioner has listed

some 25 persons whom he contends would have provided mitigation testimony at the second stage of Petitioner's trial. Petitioner has admitted that several of these individuals had contact with petitioner's counsel prior to trial, but that their offers to testify were refused. This appears substantially at odds with petitioner's claim that counsel's failure to call additional mitigation witnesses resulted from counsel's lack of awareness that additional witnesses were available, rather than from a conscious decision on counsel's part not to have additional witnesses testify. However, the court will evaluate petitioner's claim in light of counsel's decision not to call witnesses whom he knew

were available as well as counsel's failure to be aware of additional witnesses who were allegedly available to give mitigation testimony.

The court's starting point in evaluating petitioner's claim is the case of Strickland v. Washington, 466 U.S. 668, 52 U.S.L.W. 4565 (May 14, 1984). In Strickland, the Supreme Court set forth the standards for evaluating claims of ineffective assistance of counsel. First, it must be shown that counsel's performance was deficient. Deficient performance is that which falls below an objective standard of reasonableness. The objective standard is measured by the range of competence demanded of attorneys in criminal cases. This is not a particularized standard, and is

perhaps even to some extent tautological, but since the Sixth Amendment does not set forth particular requirements constituting effective assistance, more specific guidelines are not appropriate. See Strickland, *supra*, 52 U.S.L.W. at 4570.

The second component of an ineffective assistance claim is a showing that counsel's deficient Performance was Prejudicial to the defense. Counsel's deficient performance is prejudicial if it renders the outcome of the proceeding unreliable because there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient

to undermine confidence in the outcome of the proceeding. Strickland, supra, 52 U.S.L.W. at 4571-4572.

In order to establish a claim of ineffective assistance, both components of the claim must be shown to be present. That is, both deficient performance on the part of counsel and prejudice resulting from that deficient performance must be shown. Thus a court need not inquire into both components of an ineffective assistance claim if it is clear that one of the components cannot be established. Strickland, supra, 52 U.S.L.W. at 4573.

In light of these standards, the court proceeds to examine the substance of the testimony which petitioner claims would have been offered by the witnesses who were not called by his

counsel to testify at the second stage of his trial.

Petitioner claims several witnesses would have testified regarding James Clegg's reputation for dishonesty. Clegg's testimony, however, dealt with the question of petitioner's guilt or innocence, and contained no information relevant to the sentencing deliberations of the jury, which had found petitioner guilty of premeditated murder prior to commencement of the second stage of trial. Counsel's failure to call witnesses at the second stage of the trial to testify regarding Clegg's dishonesty could not possibly have affected the results of the jury's sentencing deliberations.

Petitioner claims numerous witnesses would have testified that he was a

peaceful individual who was slow to be provoked. This testimony would have been similar to, if not cumulative of, testimony which was presented to the jury by petitioner's father, Ilanders Parks. The jurors' sentencing decision reflects that either they did not believe petitioner to be a peaceful individual or they decided that any evidence that petitioner was a peaceful individual was insufficient, considering all the circumstances, to merit a sentence of life imprisonment. This is hardly surprising. The jury heard petitioner describe in his own words, with no hint of regret, how he had murdered a total stranger in cold blood in order to avoid being turned in for using a stolen credit card: and how he planned to murder another man by

blowing him up with dynamite because they had had an argument about drugs and because the man had taken petitioner's bicycle. The jury also heard testimony from petitioner on direct and cross-examination that he was involved in dealing marijuana. The court finds that there is not a reasonable probability that the jury's sentencing determination would have been different had the jury heard testimony from other witnesses besides petitioner's father regarding his reputation for peacefulness.

Petitioner claims that numerous witnesses would have testified that he was raised in several different households and that he did not have a strong relationship with his mother. This evidence is cumulative of

testimony which the jury heard from petitioner's father. It is evident from the jury's sentencing decision either that the jurors did not credit this testimony or that they felt that the somewhat unstable circumstances of petitioner's upbringing did not mitigate cold blooded murder sufficiently to merit a sentence of life imprisonment. The court finds that there is no reasonable probability that cumulative testimony on the subject of petitioner's upbringing would have altered the jury's sentencing decision.

Petitioner claims that some of the witnesses who were allegedly available to testify on his behalf would have provided testimony which was not cumulative of other testimony which the

jury heard at his trial. This testimony, petitioner claims, would have regarded such matters as petitioner's participation in extra-curricular activities, the school band and sports; that petitioner had been a good student in various subjects; that petitioner attended church regularly; and that he helped siblings and friends with their homework assignments.

However, anyone offering such testimony would thereby have permitted the state on cross-examination to re-emphasize all of the unfavorable evidence regarding petitioner's character, as was accomplished on cross-examination of petitioner's father.

Petitioner's father was asked if he was aware of some of petitioner's less

savory activities. Each fact of which he was unaware, for instance, that petitioner was a marijuana dealer or that he had been convicted of attempted burglary, allowed the prosecutor to re-emphasize these facts at the same time that it called into question the reliability of petitioner's father's favorable testimony by showing that that testimony was based on incomplete information: Each incident of which petitioner's father was aware, for instance, the school yard fight which led to petitioner's conviction for robbery by force and fear, again allowed the prosecutor to emphasize a negative aspect of petitioner's character. At the same time it called into question the credibility of petitioner's father's favorable testi-

mony by showing that petitioner's father knew of numerous incidents contradicting that view.

This sort of negative information could have been brought up again in cross-examination of each witness that petitioner put on the stand at the second stage of trial. And of course, though it was not raised on cross-examination of petitioner's father, any witness testifying to petitioner's good character could have been cross-examined with regard to the murder itself and petitioner's apparent lack of remorse. In view of the foregoing, the court finds that there is not a reasonable probability that the testimony of witnesses as to petitioner's school band membership, helping People with their homework and

the like, would have changed the result of the second stage of petitioner's trial.

This court has determined from petitioner's responses and supplemental responses to the court's interrogatories that there is no reasonable probability that calling any or all of the witnesses allegedly available to testify at the second stage of petitioner's trial would have changed the jury's sentencing decision. Thus the court finds that petitioner cannot establish the second component of his claim of ineffective assistance of counsel, that counsel's allegedly deficient performance prejudiced the defense. Petitioner has alleged in his responses to interrogatori#s that he would have at least one witness at an

evidentiary hearing who would testify that his trial counsel's performance at the second stage was deficient. As is noted above, both Strickland components must be shown in order to establish a Sixth Amendment violation. Since the court has found herein that petitioner cannot establish the second Strickland component, it is unnecessary for the court to determine whether petitioner can establish the first, either through the evidence now said to be available or through any other evidence which might be presented. Petitioner's claim of ineffective assistance of counsel at the second stage of his trial will therefore be denied. Petitioner's application for writ of habeas corpus must therefore be and is hereby denied in all particulars.

Contemporaneously with the filing of the application for writ of habeas corpus, petitioner filed herein an application for stay of execution. The court granted a stay of execution pending a decision on the application for writ of habeas corpus. Because all claims raised by the application for writ of habeas corpus have now been resolved, the court hereby lifts and dissolves the stay of execution.

IT IS SO ORDERED this 28th day of February, 1986.

RALPH G. THOMPSON
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 2-28-86.

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIO, JR.
CLERK

No. 88-1264

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

JAMES SAFFLE, Warden, Oklahoma State
Penitentiary, McAlester, GARY
MAYNARD, Director, Oklahoma
Department of Corrections, and ROBERT
H. HENRY, Attorney General of Oklahoma,

Petitioners,

v.

ROBYN LEROY PARKS,

Respondent.

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2017

QUESTION PRESENTED

Did the penalty-phase instruction telling jurors in a capital case "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence" risk misleading them into believing that they were bound to ignore sympathy engendered by the mitigating evidence and thus, in effect, the evidence itself rather than only "mere sympathy" divorced from the evidence adduced at trial, where the prosecutor's penalty summation reinforced the anti-sympathy charge by directing the jury to "leave the sympathy ... out of it"?

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Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987)	6n.6
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State v. Steffen, 509 N.E.2d 383 (Ohio 1987), cert. denied, 108 S. Ct. 1089 (1988).	7, 8n.9
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JAMES SAFFLE, Warden, Oklahoma State
Penitentiary, McAlester, GARY
MAYNARD, Director, Oklahoma
Department of Corrections, and ROBERT
H. HENRY, Attorney General of Oklahoma,

Petitioners,

v.

ROBYN LEROY PARKS,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT¹

Respondent Parks was sentenced to die for the single-gunshot killing of a gas service station attendant. After deliberating several hours, the sentencing jury rejected two of the three alleged aggravating factors: that respondent would probably commit violent crimes in the future, thus posing "a continuing threat to society," and that the murder was "especially heinous, atrocious or cruel." The jurors ultimately found the sole remaining aggravator -- that the murder had been "committed for the purpose of avoiding or preventing a lawful arrest or prosecution," which on the facts of this case was implicit in the verdict of guilt of first-degree murder. See generally 21 O.S. § 701.12.

At the outset of trial, during voir-dire, the prosecutor extracted a promise from prospective jurors that they would forswear any influence of sympathy in judging the case. He did not distinguish between the guilt and penalty phases of this capital proceeding:

MR. McKINNEY: Of course the Court will instruct you that you should not allow sympathy, sentiment or prejudice to enter into your deliberations. And frankly that's just as cold-blooded as you can put it.

* * *

¹ The majority opinion in the Court of Appeals sets out more fully the factual and procedural history of the case. See Pet. App. A, at 1-8. Parenthetical references in this section are to the transcript of the trial, by volume and page ("Tr. ____") or to the guilt and sentencing charges ("G. ____" or "S. ____"), which do not form part of the transcript but are included in the record on appeal.

You cannot allow your sympathy, sentiment or prejudice to influence you in this case and sit on this jury. And now is the time to find out if you will eliminate any sympathy, sentiment or prejudice in this case. Will all of you do that? (Tr. I, 86-87).

At the end of the trial on guilt, the court charged the jury "not [to] let sympathy, sentiment or prejudice enter into your deliberations" (G. 10).²

Respondent's defense at the penalty stage consisted of evidence and argument designed to evoke the sympathy of the jurors. His sole witness, his father, testified generally about "what kind of person ... he has been." (Tr. V, 665). Parks Senior also discussed respondent's rootless, motherless childhood as well as his own unavailability to respondent during the period he spent in prison. Although at first describing Parks as a "happy-go-lucky guy" who "got along with everybody" (Tr. V, 668), the father also evoked some of the pangs of respondent's life. Abandoned by his natural mother after his parents' marriage broke up, respondent had an unstable childhood. From the age of "two weeks or two months until ... maybe four years old," he lived with his paternal grandmother -- shifting then, his father related, to "the wife that I had at that particular time," who kept him until he was about fourteen. (Tr. V, 671). Notwithstanding the circumstances, the father tried to be a good parent to respondent, "help[ing] him to get employment, ... to buy a 15-year old car that he could knock around in, advise [sic] -- whatever I could do" (Tr. V, 670). Yet the father served time while respondent was young, and thus could not serve as a resource for Parks while he was in prison. (Tr. V, 679).

Drawing on the record of the penalty trial, defense counsel summed up by stressing respondent's youth at the time of the crime. Counsel also noted that his client had "started off with not a great deal, and not a great deal expected of him." "Robyn Parks did, however, start with quite a bit of background that I didn't have the bad fortune to possess. He started out with a family that was split-up and far-flung, and he started going to schools where he wasn't wanted" on account of racial tension arising from court-ordered busing. (Tr. V, 710, 714-15; see also Tr. V,

² At the sentencing phase, the court charged the jury among other things: "All of the previous instructions given you in the first part of this trial apply where applicable and must be considered along with these additional Instructions." (S. 9).

669, 691). Counsel concluded with a plea for mercy, based in part on the inference the jury could draw from the evidence that Parks was capable of rehabilitation:

I would ask that the human kindness, the very human nature that everybody brought into this Courtroom, would allow Robyn Parks to go to prison and to mature in prison ... to give him a chance to make him the kind of human being that you would want to see him being.

* * *

I just plead ... with you to give Robyn a sentence of life in prison ... to give a little mercy, a little clemency to the person whom I've come to know, and I don't think needs to or deserves to die. (Tr. V, 722-23).

In the state's summation at the penalty phase, the prosecutor "called in" the jurors' promise to eradicate sympathy entirely from their deliberations:

[Defense counsel's] closing arguments are really a pitch to you for sympathy -- sympathy or sentiment or prejudice; and you told me in voir-dire you wouldn't do that.

Well, it's just cold turkey. He either did it or he didn't. He either deserves the death penalty or he doesn't you know. You leave the sympathy, and the sentiment and prejudice part out of it. (Tr. V, 725-26) (emphasis added).

The court, finally, charged the jury:

You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence. You should discharge your duty as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions. (S. 9) (emphasis added).

REASONS FOR DENYING THE WRIT

The court of appeals correctly applied longstanding Eighth Amendment principles that need no further elucidation. Its holding, moreover, fully conforms with the decision and rationale of the recent California v. Brown, 479 U.S. 538 (1987), which petitioners persistently misconstrue.

Although the court below struck down a so-called anti-sympathy charge while some state courts and the Court of Appeals for the Fifth Circuit, as well as Brown, have declined to vacate capital sentences where juries had received similar instructions at penalty trials, the purported conflict between their approaches and the Tenth Circuit's is largely illusory since the validity of such instructions turns on details of wording and context -- matters of interpretation, not principle. For the same reason, a decision by the Court in the present matter would give little guidance to the lower

courts.³ In addition, because those courts have only begun to respond to Brown, any remaining questions about the propriety of anti-sympathy charges would benefit from further examination in various settings by different courts.

Simply put, this case has major significance for only one person: respondent Parks. It plainly merits no further review.

1. As early as Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court made clear that "the fundamental respect for humanity underlying the Eighth Amendment" compels attention to "the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Recognizing "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," id., the Court has consistently reaffirmed its commitment to the capital defendant's right to present and have the sentencer consider any such evidence in mitigation. See, e.g., California v. Brown, 479 U.S. at 541; id. at 545 (O'Connor, J., concurring); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978). Summing up this well-settled doctrine, Justice Blackmun, speaking for the Court in Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988), noted that barriers to consideration of mitigating evidence will be overturned whether they are imposed by statute, by the sentencing court, by an evidentiary ruling, or by a charge or verdict sheet. In other words, the existence -- not the form -- of the obstacle counts.

In Brown, at least eight justices agreed that sympathy rooted in the evidence at trial may properly influence the penalty decision. Hence the Court necessarily determined that an instruction (or other device) barring such factually tethered sympathy would constitute a forbidden obstacle to full consideration of mitigating proof since it would "preclude[] precisely the response that a defendant's evidence of character and background is

³ Indeed, a decision on the question presented might not even dispose of this case since an independent constitutional claim, raised by the record and addressed below, supports the judgment granting relief from the capital sentence. See infra at 9; see generally Berkemer v. McCarty, 468 U.S. 420, 435-36 n. 23 (1984); U.S. v. New York Telephone Co., 434 U.S. 159, 166n.8 (1977).

designed to elicit," 479 U.S. at 548 (Brennan, J., dissenting), rather than "only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." Id. at 542 (Rehnquist, C.J., for the Court) (emphasis added); see Parks v. Brown, 860 F.2d 1545, 1553 (10th Cir. 1988) (en banc); Pet. App. A at 37-38. The Court divided only on the question whether the specific charge at issue, which told the jury it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," id. at 539, could have caused a reasonable juror to feel obliged to repress sympathy evoked by the proof.⁴ Dwelling heavily on the adjective "mere," which was thought to convey the notion of sympathy extraneous to the record, the majority determined that this instruction had not risked diverting the jury from its duty to consider mitigating evidence -- especially where, at the sentencing trial, the defendant had presented thirteen witnesses in his behalf.

Petitioners now, as earlier in the court of appeals, stubbornly misinterpret Brown as sanctioning total preclusion of sympathy from capital penalty determinations. See generally Pet. for Cert. at 11-29.⁵ On

⁴ Compare id. at 542 (opinion for the Court) with id. at 549-550 (Brennan, J., dissenting) and id. at 563 (Blackmun, J., dissenting); see id. at 544-45 (O'Connor, J., concurring). Justices Blackmun and Marshall, in fact, wrote separately in order to stress their view that compassion and mercy play a critical role in capital sentencing. While Justice O'Connor viewed the life-or-death inquiry as based more appropriately on moral rather than emotional reactions to evidence about the crime and the criminal, she expressed concern lest charges of this type mislead jurors into believing that mitigating evidence about a defendant's background or character must also be ignored. Id. at 545-46.

⁵ In particular, compare id. at 18 ("[A]s was the case in Brown, a reasonable juror would consider sympathy, sentiment, passion, and prejudice to be no more than a catalogue of the kind of factors that could improperly influence their decision to vote for or against the death penalty") and id. at 25 ("[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the guilt of the defendant and not an emotional response to the mitigating evidence") with Transcript of Oral Argument in Parks v. Brown, July 21, 1988 (10th Cir.) (en banc), at 27-29:

MR. NANCE: I am suggesting, Your Honor, as I think the panel majority found, that sympathy is not mitigating evidence at all. Is not a mitigating factor at all.

It is as Brown said, and as the panel majority said, an extraneous emotional factor.

THE COURT: But isn't sympathy what mitigating evidence invokes?

MR. NANCE: No, your Honor, I don't think it does.

* * *

MR. NANCE: ... I don't think that Brown endorses sympathy as a

account of this misperception, they argue that the holding of the court below "cannot be reconciled" with Brown.⁶ Pet. for Cert. at 10. Nothing could be farther from the truth.

In fact, adhering precisely to the Court's directive in Brown, Judge Ebel, the author of the Circuit majority opinion, "focused initially on the specific language challenged" -- most pertinently: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." 479 U.S. at 541, quoting Francis v. Franklin, 471 U.S. 307, 315-16 (1985); see Parks, Pet. App. A at 30-32 (footnote omitted) (emphasis added), 35-40nn.9, 11. Finding that it "fail[ed] constitutional muster" by globally banning all sympathy, whether or not rooted in the record, he then "review[ed] the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." See 479 U.S. at 541; Pet. App. A at 53-59. Because it did not, "the substantial possibility" that respondent's "jury felt constrained in its ability to consider the mitigating evidence because of the absolute bar to its ability to consider sympathy" necessarily compelled reversal. Id. at 33-34, 56-57, quoting Mills, 108 S. Ct. at 1867. A court of appeals' application of a settled method of inquiry to a particular set of facts would hardly call for this Court's review, even had the court reached the wrong result. But since the majority's conclusion was right, review would

consideration in capital sentencing.

⁶ Their misapprehension has also led them to misunderstand the implications of the Circuit's decision. E.g., they assert that it "create[d] a constitutional requirement that sentencing jurors not merely consider mitigating factors but "'fully consider' them with a sympathetic attitude." Pet. for Cert. at 13. Of course, the majority held only that the state could not create an artificial barrier to such sympathetic response to the evidence as the jurors might wish to extend. Equally, Petitioners' "parade of horrors" is wide of the mark and disingenuous. E.g., counsel for the state was also the attorney in Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987), in which the court refused to countenance the very sorts of "emotional appeals on behalf of Defendants" that petitioners claim this case will produce. Pet. for Cert. at 30-31. Cf. Robison, 829 F.2d at 1503-05 (affirming exclusion of testimony by victim's sister that jury should not impose death: the proposed evidence was both irrelevant and "calculated to incite arbitrary response").

be especially unwarranted.⁷

2. As an afterthought, petitioners contend that the Tenth Circuit's decision in Parks creates a conflict with Byrne v. Butler, 847 F.2d 1135 (5th Cir. 1988), recently decided by the Fifth Circuit, as well as with several state court decisions, all of which upheld anti-sympathy instructions on the particular facts presented. See, e.g., People v. Emerson, 522 N.E.2d 1109 (Ill. 1987), cert. denied, 109 S. Ct. 246 (1988); State v. Steffen, 509 N.E.2d 383 (Ohio 1987), cert. denied, 108 S. Ct. 1089 (1988); see generally Pet. for Cert. at 33-38. Yet on as fact-bound an issue as this -- which depends so heavily on minor variations in language and context, potentially involving prosecutors' comments in addition to the trial court's charge to the jury⁸ -- it is hard to identify a true "conflict," and scarcely worth the effort to do so since Brown so recently enunciated the general guidelines in this area.

Byrne is especially illustrative of the problem of making relevant comparisons in order to determine if a conflict exists, let alone one sufficiently important to merit the attention of the Court. In the course of denying a stay of execution and a certificate of probable cause in the

⁷ The majority judges correctly relied on the following facts to distinguish this charge from the charge in Brown: (1) the absence of what Chief Justice Rehnquist dubbed the "crucial" modifier "mere" for "sympathy," 479 U.S. at 541; (2) the injunction to avoid "any" influence of sympathy; and (3) the global equation of sympathy with "other arbitrary factor[s]." See Pet. App. A at 35-40nn.9, 11. They also parsed the surrounding instructions to show that the jury received at best conflicting messages regarding the proper role of sympathy in the sentencing determination and noted that respondent had introduced some mitigating evidence of background and character, which counsel argued as a basis for juror compassion and mercy. Pet. App. A at 51-59, quoting Francis v. Franklin, 471 U.S. at 322 ("[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"); cf. Coleman v. Saffie, 1989 U.S. App. Lexis 2623, 42-52 (10th Cir., Mar. 6, 1989) (where defendant put on no mitigating evidence, any sympathy jury could feel would be factually untethered; hence Parks-type anti-sympathy charge did not impair the defendant's rights).

Although concluding that "the general anti-sympathy instruction in this case" violated the Eighth Amendment "even when viewed independently from the prosecutor's anti-sympathy remarks," the Ebel opinion employed those comments to illustrate the risk (discussed by both Justice O'Connor and Justice Brennan in Brown) that this type of charge will be used improperly to reduce the jury's consideration of mitigating circumstances. See Pet. App. A at 10, 64-68; see also 479 U.S. at 545-46 (O'Connor, J., concurring); id. at 555 (Brennan, J., dissenting). Judge Ebel also remarked that the prosecutor's statements, taken as a whole, had exacerbated, not ameliorated, the effect of the unconstitutional instruction. Pet. App. A at 59.

⁸ See generally Brown.

setting of a successive petition, the Court of Appeals for the Fifth Circuit summarily disposed of the anti-sympathy instruction issue by relying on the District Court's opinion. That court initially held that Byrne had both abused the writ and procedurally defaulted his claim; it then only briefly addressed the merits. Although the judge rejected the attempted distinction of Brown based on the absence of the word "mere" and in that regard is at odds with Parks, the precise words of the challenged instruction are never quoted, nor is the remainder of the charge discussed.⁹ But the judge did note in support of his holding that the trial court seemingly gave the instruction in response to prosecutorial argument "designed to incite the sympathy and passion of the jury in favor of the victim." 847 F.2d at 1140 (emphasis added). In that entirely different setting, the anti-sympathy language may have actually inured to the defendant's benefit -- a circumstance that must have influenced the courts' perfunctory denial of the claim.

In light of the extremely scant guidance that Court review of the instant facts would provide to state and federal courts and to prosecutors around the country, certiorari is plainly unwarranted. Further, whether or not instructions "like" this one "are common" in Oklahoma, as petitioners represent, Pet. for Cert. at 32, in point of fact the State's Uniform Jury Instructions do not contain any such charge in the sections on "Death Penalty Proceedings." See OUJI-CR §§ 432-445, at 77-86 (1981). Even in Oklahoma, therefore, a decision by the Court in respondent's case would have limited precedential value because of the variations in wording, not to speak of context, in "common law" anti-sympathy charges. E.g., compare Johnson v. Oklahoma, 108 S. Ct. 35 (1987) (Brennan and Marshall, JJ.,

⁹ If the language mirrors that of another Louisiana decision, State v. Copeland, 530 So.2d 526, 537 (La. 1988), cited in Byrne, 847 F.2d at 1140 ("You are not to be influenced by sympathy, passion, prejudice, or public opinion. You are to reach a just verdict."), it is less egregious than the charge in Parks. See supra at pp. 3, 6. The same is true of the language of anti-sympathy instructions in other cases addressing their validity. See e.g., Emerson, 522 N.E. 2d at 1122 ("Neither sympathy nor prejudice should influence you. You should not be influenced by any person's race, color, religion, or national ancestry."); Steffen, 509 N.E.2d at 396 (jurors instructed to "disregard feelings of sympathy in their deliberations"); State v. Porterfield, 746 S.W.2d 441, 450-51 (Tenn.), cert. denied, 108 S. Ct. 1756 (1988) (jurors charged that they "must not allow sympathy or prejudice to influence them in reaching their verdict"). In some instances, e.g., Steffen, the court specifically sustained the instruction "in its context," id. at 396 -- a context necessarily different from Parks.

dissenting from denial of certiorari) ("[Y]ou should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence.") with Parks. See Pet. App. A at 8, 30-31; supra pp. 3, 6.

3. An additional factor militating against the grant of certiorari is the presence of an independent ground for affirming the judgment of the court below. Three of the Tenth Circuit judges would have vacated respondent's sentence on account not only of the absolute anti-sympathy charge but also of the state's penalty summation in which, in blatant defiance of the principles of Woodson and Caldwell v. Mississippi, 472 U.S. 320 (1985), the prosecutor sought to suggest that the death penalty was mandatory and to mislead the jury into feeling "less responsible than it should for the sentencing decision." See Darden v. Wainwright, 477 U.S. 168, 184n.15 (1986).¹⁰ Since these judges' view was correct, a hypothetical determination of the Question Presented in petitioners' favor would amount to a gratuitous advisory opinion -- a waste of the Court's scarce resources.¹¹

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 31, 1989

¹⁰ See Parks (Holloway, C.J., with McKay and Seymour, J.J., concurring and dissenting); id. (McKay, with Holloway, C.J., and Seymour, J., concurring in part and dissenting in part); Pet. App. A at 1, 1. (Each opinion is paginated separately.)

¹¹ Cf. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions.").

AFFIDAVIT OF MAILING

I, VIVIAN BERGER, counsel of record for respondent Robyn Leroy Parks, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31 of March 1989, within the time permitted for filing, I caused to be deposited in the United States mail, with first-class postage prepaid, one original and nine copies of the foregoing Brief for the Respondent in Opposition, addressed to the Clerk of the Supreme Court of the United States.

Nin Ber
VIVIAN BERGER

Subscribed and sworn to
before me, a Notary Public
at New York, New York this
31 day of March 1989

Harriet Rapp
NOTARY PUBLIC

HARRIET RAPP
Notary Public, State of New York
No. 31-5475460
Qualified in New York County
Term Expires 11-30-90

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for Respondent Robyn Leroy Parks, and that I served the annexed Brief for the Respondent in Opposition on Petitioners by placing a copy in the United States mail, first-class mail, postage prepaid, addressed as follows:

Robert Nance, Esq.
Assistant Attorney General
Room 112
State Capitol Building
Oklahoma City, OK 73105

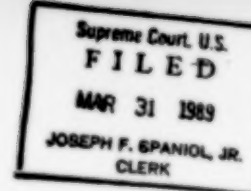
All parties required to be served have been served.

Done this 31 day of March, 1989.

Nin Ber
VIVIAN BERGER

IN THE SUPREME COURT OF THE UNITED STATES

NO. 88-1264



JAMES SAFFLE, Warden, Oklahoma State
Penitentiary, McAlester, GARY
MAYNARD, Director, Oklahoma
Department of Corrections, and ROBERT
H. HENRY, Attorney General of Oklahoma,

Petitioners,

v.

ROBYN LEROY PARKS,

Respondent.

The respondent, Robyn Leroy Parks, asks leave to file the attached Brief for the Respondent in Opposition without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in the United States District Court and the United States Court of Appeals. Respondent's Affidavit in support of this motion is attached hereto.

Respectfully submitted,

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(212) 854-5521

Attorney for Respondent Parks

March 31, 1989

SUPREME COURT OF THE UNITED STATES

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma;
LARRY MEACHUM, Superintendent,
Oklahoma Department of Corrections;
and MICHAEL C. TURPEN, Attorney
General of Oklahoma,

No. _____

Petitioners,

v.

ROBYN LEROY PARKS,

Respondent.

Affidavit

I, ROBYN LEROY PARKS, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being require to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? (Yes or No) NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 8-30-76

N/A

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

(Yes or No) NO

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N

3. Do you own any cash or checking or savings account? (Yes or No) NO

a. If the answer is yes, state the total value of the items owned. N

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? (Yes or No) NO

a. If the answer is yes, describe the property and state its approximate value. N

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

/s/ Robyn LeRoy Parks
ROBYN LEROY PARKS

Subscribed and Sworn to Before

me this 30th day of January, 1989.

[Signature]
NOTARY PUBLIC
My Commission Expires 2-27-91

CERTIFICATE OF SERVICE

I hereby certify that I am attorney of record for respondent Robyn Leroy Parks, and that I served the annexed Motion to Proceed In Forma Pauperis on Petitioners by placing a copy in the United States mail, first-class mail, postage prepaid, addressed as follows:

Robert Nance, Esq.
Assistant Attorney General
Room 112
State Capitol Building
Oklahoma City, OK 73105

All parties required to be served have been served.

Done this 31 day of March, 1989.


VIVIAN BERGER

JOINT APPENDIX

(7)

No. 88-1264
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

Supreme Court, U.S.
FILED
JUN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,
Petitioners,

vs.

ROBYN LEROY PARKS,
Respondent.

JOINT APPENDIX

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8779

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RELEVANT DOCKET ENTRIES

District Court of Oklahoma County,
Case No. CRF-77-3159

9/23/78 Jury verdict returned.
10/16/78 Formal sentencing.

United States District Court for
the Western District of Oklahoma
Case No. CIV-84-1618-T

12/23/81 Petition for Habeas
 Corpus.
11/5/85 Opinion and Order of
 Judge Thompson;
2/28/86 Opinion and Order of
 Judge Thompson.

United States Court of Appeals
for the Tenth Circuit
Case No. 86-1400

3/14/86 Appeal filed in Court of
 Appeals.
7/15/87 Opinion filed.
3/1/88 Rehearing granted.

10/28/88 Opinion filed - Rehearing
 en banc.

2/6/89 Petition for Certiorari
 filed.

THE DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
OKLAHOMA COUNTY, STATE OF OKLAHOMA

[Title Omitted in Printing]

EXCERPTS FROM VOLUME I
OF TRANSCRIPT OF JURY TRIAL
September 18, 20-23, 1978

* * * *

[31] THE COURT: You know, ladies and gentlemen, it's a good system. The beauty of the jury system is you take twelve people -- whatever twelve that ends up on this jury -- from different walks of life, from different occupations, [32] from different experiences in life, usually total strangers to each other, put them in a jury box, let them hear the same evidence, let them follow the same law,

and you would be surprised how accurate jury verdicts are.

And the reason we're asking you these questions is: We want to determine whether or not you should sit on this particular jury. Now, all of you are qualified jurors, but should you sit on this jury? Because you see, both sides -- not just one side now-- but both sides, both the State and the defendant, are entitled to a judge and a jury who is impartial, who will follow the law, determine the facts and render a fair and impartial verdict.

You're going to swear you'll do that if you sit on this jury. And that's what we want to find out -- should you sit on this particular jury? There may be some reason why you shouldn't. And if there is, and it's a good reason--

it's not a good reason just because you don't want to -- but if there's a good reason why you shouldn't sit on this jury and you know about it, you should tell us when the time comes here.

If there was some reason why I couldn't be the judge of this case, I would just disqualify myself that quick (snaps fingers) and I would get another judge to try the case. You should do the same thing -- we should get another juror out here to take your place if there is some reason [33] why you can't be fair to both sides of this case.

You see, in our free country, you've got a right to do a lot of things. You've got a right to be prejudiced, if you want to be prejudiced I'm not talking about racial prejudice, you

know, but it includes that. You've got a right to be prejudiced about anything you want to be prejudiced about. I'm not suggesting that you do be prejudiced, but you can be if you want to.

You could say right now, "I don't like Mr. McKinney's tie, and I don't like the District Attorney," or you could say, "I don't like something I see over here at this table and I'm going to find so and so." You've got a right to do that. You've got a right to be as prejudiced as you want to be, but you can't be prejudiced and sit on the jury at the same time. You've got to leave your prejudice outside the Courtroom.

You see, because there is no -- and I tell every jury this -- there is no

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magic about being in this Courtroom and me sitting up here. There is no magic about this black robe or you sitting in the jury box. There is no magic about this building. The magic is in the people -- the people that try the case.

We could try it out on the Courthouse lawn. It's not going to help you to be in this room. And, if you can't give both sides a fair trial, if we have juries down here where [34] the judge or the jury has a fixed opinion, where they decide the case before they hear it, if they let prejudice decide the case; then we might as well burn this Courthouse down because it serves no useful purpose whatsoever.

And we might as well say, "I helped destroy our justice system because I

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sat on a jury and I was prejudiced and I knew it and I didn't tell anybody." You destroy your own system if you do that. I don't think you will, but I want to point out the importance of what we're doing here today. This is a very serious case. You're talking about a life or a death here, and so it is important -- important to both sides of this case.

Now, have you heard anything so far that would keep you from being a fair and impartial juror? I want you to hold up your hand. Anything that you heard?

PROSPECTIVE JURY, COLLECTIVELY:
(Shakes heads back and forth.)

* * * *

[86] MR. MCKINNEY: Of course the Court will instruct you that you

should not allow sympathy, sentiment or prejudice [87] to enter into your deliberations. And frankly, that's just as cold-blooded as you can put it.

During this trial, no matter if you get to dislike me as an attorney or you don't like the way I part my hair or you don't like David Hood or you don't like the looks of the Defendant or you think he looks real good and you think you ought to rule for it that way; as Judge Cannon told you, you can have your sympathies and your sentiment and your prejudices all you want to -- you know you can be as sympathetic as you want to or you can be as prejudiced as you want to be, but you can't do it and sit on this jury. So that's just a real simple way that Judge Cannon put it to you.

You cannot allow your sympathy, sentiment or prejudice to influence you in this case and sit on this jury. And now is the time for us to find out if you will eliminate any sympathy, sentiment or prejudice in this case. Will all you do that?

(No response.)

* * * *

Instruction No. 6
In the Penalty Phase

* * * *

You are further instructed that mitigating circumstances, if any, must also be considered by you, and although they are not specifically enumerated in the statutes of this State, the general law of Oklahoma and the United States sets up certain minimum mitigating circumstances for you to follow as guidelines in determining which sentence should be imposed in this case. You must consider all the following minimum mitigating circumstances and determine whether any one or more of them apply to all of the evidence,

facts and circumstances of this case. You are not limited in your consideration to the minimum mitigating circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine.

The minimum mitigating circumstances are:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
4. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;

5. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;
6. The defendant acted under duress or under the domination of another person;
7. At the time of the murder the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease or intoxication;
8. The age of the defendant at the time of the crime.

R. Vol. II, Instruction No. 6.

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Instruction No. 9
In the Penalty Phase

* * * *

In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the State or the defendant and whether presented in

the first proceeding or this sentencing proceeding.

All of the previous instructions given you in the first part of this trial apply where applicable and must be considered along with these additional Instructions; together they contain all the law of any kind to be applied by you in this case, and the rules by which you are to weigh the evidence and determine the facts in issue. You must consider them all together, and not a part of them to the exclusion of the rest.

You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

The court has made rulings during the sentencing stage of this trial. In doing so, the Court has not expressed nor intimated in any way the conclusions to be reached by you in this case. The Court specifically has not expressed any opinion as to whether or not any statutory aggravating circumstances exist, or whether or not any mitigating circumstances exist.

You must not use any method of chance in arriving at a verdict but must base it on the judgment of each juror concurring therein.

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EXCERPTS FROM VOLUME V
OF TRANSCRIPT OF JURY TRIAL
September 23, 1978

* * * *

[695] THE COURT: The law provides, ladies and gentlemen, as it did before, that the State opens the argument, and the Defendant then argues and the State closes the argument.

At this time, Mr. McKinney, you may make your opening remarks on behalf of the State of Oklahoma.

MR. MCKINNEY: If it please the Court, ladies and gentlemen of the jury, as you were selected for this jury in the voir dire, you may not have realized the importance of the question

-- and, of course, all the questions the Court asks you were important. What few questions I asked you on the voir dire, I felt were important, and I'm sure that Mr. Hood on his felt that they were important.

But in the selection of a jury in a case involving the death penalty, probably one of the most important questions -- Judge Cannon asks it in every Murder in the First Degree trial that he has conducted that I have participated in -- if you feel the law and the evidence warrant it, could you without doing violence to your conscience, agree to a verdict inflicting the death penalty?

You may not have realized at that point that the evidence that you would hear from this stand would justify you

in giving an awful lot of consideration to the death penalty because, you know, just sitting there and you haven't heard any evidence or anything, it's kindly hard to visualize, well, yes, I could. If it's a proper case and the [696] evidence warranted it, and the law warranted it, I could return the death penalty without doing violence to my conscience. So now you're faced with the oath that you took, that you would consider that.

Now the Court has laid down some guidelines to put in front of you. They're -- you know, I'm not going to comment an awful lot, but just briefly. They're the guidelines -- that in explaining these Instructions -- the Court has told you that these are the aggravating circumstances you must

consider. Now before you would be authorized to even think about giving the death penalty, you must find that one of the aggravating circumstances existed. The murder was especially heinous, atrocious or cruel is number one. Now, I don't know whether we have progressed so far in our thinking that if you're standing up and facing a person and he's holding a .45 revolver and he's got it all cocked and everything and he's in the process of just getting ready to pull the trigger -- I don't know what went through the mind of Mr. Ibrahim at that point. Can't we visualize what a horrible what a horrible feeling he must have felt at that moment, and as that gun went off and as that bullet entered into his chest and as he fell to the

floor and as the blood and the froth gurgled up through his nose, can't we just visualize and imagine the suffering that he went through, the pain as the bullet struck him, the pain that he [697] must have suffered?

And the Court has interpreted for you what the word heinous means-- "extremely wicked or shockingly evil." Well, what in the world could be more wicked or shockingly evil than to stand there with this cocked .45 and fire it into the body of Mr. Ibrahim?

"'Atrocious' means outrageously wicked and vile." What could be more wicked than what this Defendant was doing? "'Cruel' means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others; pitiless." You

could tell by the tapes, the Defendant had no pity of any kind towards Mr. Ibrahim -- no pity of any kind. Throughout his testimony, there has been no pity of any kind. The only thing that he regrets in this case is he got caught. But no pity of any kind -- so pitiless. So certainly in your deliberations, you could give a lot of real serious thought to the first aggravating circumstance.

"Number two. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution." Well, it just can't be any doubt about that, can there? The Defendant, in his own words tells you, as you listen to the tapes. Why did he do it -- and I probably had said this in my closing, and you heard it on the

tape -- "Yea, but, well, this is what I'm trying to get you to see, ain't no witnesses." "Ain't no witnesses." "When he got my number I said, man, if [698] I leave, I says, I won't get two blocks before they would be on me because he gonna tell it that I got, you know, a hot credit, gas credit card." So under any circumstances, number two's got to apply -- if the law is going to mean anything at all, if it's got any meaning of any kind -- in this case here the law has got to apply that "the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution," and the Defendant tells you that himself in his own voice from these tapes.

"Number three. The existence of a probability that the Defendant would

commit criminal acts of violence that would constitute a continuing threat to society." Now let's look at that for a moment. Here we've got a young man going to school, and I presume that David Hood -- it appears to me when he had the Defendant testifying, he was going to pass this off as just a fight. In his questions to David Boren, he tried to pass it off, well, this fight -- this fight, you see. Well, it was sure a one-sided fight -- if it was a fight. But let's see whether it was a fight or not. You know, for fighting you don't get charged with Robbery by Force; in a fight, the most you get filed on for is Assault and Battery which carries up to about 30 days in jail, something like that. That's

Assault and Battery, when you're just in a fight.

And as the Defendant brought out and as Mr. Hood [699] brought out in his examination of the Defendant, he was charged with Robbery by Force, and that's the kind of force that was used the beating up of the victim. And he was charged with Robbery by Force, and he pled guilty and received a five-year suspended sentence. And see, you don't get that, and you don't get that kind of charge by a fight, so it was not a fight. It was three boys that just beat David Boren up to get his money. And what did he get? A lousy six cents. Can you imagine knocking a man to the ground, hitting him and stomping him, and kicking him, turning his

pockets inside out for a lousy six cents?

And, you know why he killed Mr. Ibrahim? For a lousy tank of gas. So he wouldn't get caught, he's got to kill him. Now that's the kind of person that you've got to judge out here to whether or not he deserves to continue living or not.

Let's think about something else that the Defendant himself tells you in these tapes. James Clegg asked him and of course, the Defendant says, ah, no, I didn't have no dynamite in my car, huh-uh. Well, he told you in the tapes when he didn't think anybody else was listening but James Clegg -- he told you he had it in there.

Now then, what's he going to do with that dynamite? What does he tell you

he's going to do with it? James asked him, "What's the dynamite for? Robyn: I was going to do some [700] damage"-- and you'll pardon one of the words in here, but this is not my words, it's the words of this Defendant -- I was goin to do some damage," "remember I told you I was going to get that Niger." That's what he told you.

Someone had got some coke from Nesie. And he told him -- and I told him that's mine, but, "I had never planned to do nuthin until he started gettin all outrageous and then took a ten speed of mine and sold it, you know, told me I owed him \$50 for rent." "You know, but, hey man, he came back with that, I said hey man, I'm gonna tell you now, I'm get gonna you, I says I am gonna get you when I get ready."

That's what he tells you in his own voice, he's going to do with that dynamite that he now tells you from the stand that there wasn't no dynamite there, but when he don't know anybody-- when he thinks nobody is listening but James Clegg, that's what he tells you in that tape.

Now, a man that has robbed by force, a man that has carried dynamite in his car and is carrying in his mind that he's going to get somebody when he's ready; and a man that drives into a filling station and fills his tank up with gas and because Mr. Ibrahim sets his tag number down, he kills him-- then I say that number three fits just as clearly as you could ever get it to fit. "The existence of a probability that the Defendant would commit

criminal acts of violence that would constitute a continuing threat to society."

[701] Isn't he a time bomb here just ready to explode any time the occasion comes about? Is he a man that is safe to ever walk the streets of Oklahoma City again in his whole life? Doesn't he most certainly constitute a threat to society? And the law says, when he's reached that point in his life, that then you can consider that as an aggravating circumstance to assess the death penalty. It's just real plain and simple.

Now, the Court has also given you that once you have on aggravating circumstances -- and of the three listed, before you can consider the death penalty, you consider and agree

that there is one -- at least one aggravating circumstance. You can consider -- you can find there's one, or there's two or that there's three; but must find one before you can consider the death penalty. Now once you've found at least one, then you must go, under the law, over to the mitigating.

"One, the Defendant has no significant history of prior criminal activity." Robbery by Force, Attempted Burglary, has served time in the penitentiary. But above all of that now, at the time that this has happened, he is a big dealer in marijuana. This doesn't say that you can only consider what he's been convicted of. But a big dealer in marijuana. That's number one. Well,

you know, to me, I'd say that is a very significant history of prior criminal activity, and would not be a mitigating circumstance.

[702] "Number two, the murder was committed while the was under the influence of extreme mental or emotional disturbance." There's no evidence of that. There wasn't any disturbance, he just thought that Mr. Ibrahim would call this tag number into the police, and he would have said the man's bought some gasoline on a hot credit card, that they catch him and he'd have to go back to the penitentiary. That's not the kind of an emotional disturbance that the law is talking about, in my opinion.

And "number three" -- you see, the

Court has to give these. The law says he's got to give them, and this is the law, and you must consider them.

Now listen to this: "The victim"-- that's Mr. Ibrahim -- "was a participant in the Defendant's homicidal conduct . . ." Well, he really was, wasn't he? Because he's one that got killed. So he was a participant to that extent, but that ain't what the law is talking about.

". . . or consented to the homicidal act." In other words, that Mr. Ibrahim consented that Robyn Parks could stand there with that pistol in his hand and shoot him up there and kill him. But, anyway, that's the law, that you must consider these things.

"The murder was committed under circumstances which the Defendant

believed to provide a moral justification or extenuation for his conduct." Well, in his way of thinking, maybe he did think that-- that, you know, morally it's all [703] right, if somebody's going to report you to the police for something you've done, that morally that's all right. But I don't believe the law intended that to be an excuse for somebody to go out and kill somebody.

"Number five, the Defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor." Nobody in the world committed this murder but Robyn Parks, and you've so found. That should eliminate that one.

Number six, the Defendant acted under duress or under the domination of another person." Well, there's no evidence of anything like that. No one else told Robyn Parks to kill Mr. Ibrahim.

"Number seven, at the time of the murder the capacity the Defendant to appreciate the criminality, the wrongfulness, of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease or intoxication." Well, Mr. Hood told you in his closing argue that that is not involved at all. But as I say, the has to give you this Instruction.

"Number eight, the age of the Defendant at the time of the crime."

There is the aid that the Court's given you.

And, now the Court also tells you, you can consider anything else that you want to, to mitigate the penalty of [704] and the term of life. You can consider anything you want to in addition to what he's told you. And, then in your consideration -- now here's my main point -- in your consideration of all of these things or anything else you want to consider-- "and determine whether one or more of them apply to all the evidence, facts and circumstances of this case " In other words, whether or not you feel like that these mitigating circumstances are so strong in favor of the Defendant it's just going to

eliminate and do away with the aggravating circumstances.

Now, of course, I may be prejudiced. I don't know. I heard the evidence, though, just as you heard it. I can't think of -- in my thinking of it and going over it very carefully, and I've tried to analyze it in the light of the prosecution -- there's no doubts about it, I am very interested in prosecuting this case. But also, I tried to look at it in the eyes of the Defendant. In the prosecution -- I think that the prosecutor should because maybe we get a little one-sided in our thinking, you know, and think, well, everybody ought to be in the pen -- in the penitentiary but me, and then sometimes I wonder about me. So, I try to steer away from that kind of thinking; and so, when I'm

preparing for a case and trying one, I try to consider all of the prosecution angles of it. But then I also try to sit back and look at it -- well, now let's say that if I was representing [705] the Defendant or if I was the Defendant, how would I look at this, that or the other. So looking at it from both sides, I can't find a single, solitary mitigating circumstance that would offset any of the aggravating circumstances.

He put his father on, and I don't frankly a twice-convicted felon, I'm not making any issue about that part, that's his lifestyle and everything, but he tried to -- I got the impression in direct examination, he tried to leave the impression on you that Robyn Parks was a happy-go-lucky. I don't

know whether he intended to mean by that that he could kill somebody in cold-blood and it would not bother him any. You know, happy-go-lucky guys kindly -- I've always visualized them as someone that no matter what happens, you know, they just brush it off and kind of laugh about it and so forth. And whether or not -- in listening to Robyn Parks' voice on the recording, it does appear to me that he still is that way. He's just kind of happy-go-lucky, you know, so, well, yeah, I killed a guy, and ha ha, so, you know, what; so what? You know, he's dead, and not any witnesses; and besides, if they get me and catch me, who's going to say anything. He's not here anymore. And, you know, a happy-go-lucky guy. So

maybe his father gave a great description of him.

But he also, then, tried to give you the impression he got along with everybody, and he had no problems, he [706] didn't get in fights and never participated in any. But, lo and behold, on cross examination he's the one that brought Robyn Parks down to the police station when this happened. Brought him down there, and they talked to Bill Wolf -- Detective Wolf. And, he knew all about that. He knew all about the fact that his son got charged with Robbery by Force, and he knew all about the fact that he had pled guilty to it. He said, yeah, he stood up in front of a judge and says, yes, I did that, that's what I did. And, he was represented by an attorney. He had the

full advantage of legal advice. But yet, he was first -- he started up there -- Robyn just didn't get in fights and never participated in any, and he got along with everybody and had no problems. Well, golly, you know, Mr. Hood has talked a lot about the way of life; and, you know, a different lifestyle; and maybe Robyn Parks has a different lifestyle than we have and maybe his father has; but those things that Robyn Parks had got into, certainly, I would -- I couldn't truthfully say, on the stand, that he had no problems.

Now we get down to sometimes a jury thinks, well, you know, I could return a verdict assessing the death penalty without doing any violence to my conscience; but, you know, when you get

right down to it, you know, really just because he murdered a guy in cold-blood -- and you've seen the horrible results of it. I'm not going to show it to you again because you've already seen the horrible results of what [707] he did. And then you may say, well, you know, yeah, I still mean it, I could, without doing violence to my conscience if this was a proper case; but, you know, I really don't want it on my hands that I had anything to do with anybody dying. So for that reason, although this is a proper case, I don't want to assess the death penalty because I just don't want to have to think about that. I don't want it on my conscience.

Well, I don't think it's on Robyn Parks' conscience that he took an innocent person's life away; and I

don't believe in observing him throughout this trial and his testimony and listening to his voice on the tapes -- I don't feel like there's the least bit of remorse in him over what he did. But, you know, as you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict -- once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal justice system that says when this type of type of thing

happens, that whoever does such a horrible, atrocious thing must suffer death.

Now, that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. [708] So don't let it bother your conscience, you know. You consider all of this evidence. That's why we just reintroduced it, there wasn't any use in putting anything else on, you heard it all. You've seen the results of the tragic thing that Robyn Parks did to another for a lousy tank of gas. Can you imagine that? A man's life is worth no more than a tank of gas. Isn't that horrible? Can you think of a more proper case -- more proper case in which your verdict assessing death would be more proper?

Thank you.

THE COURT: Mr. Hood, you may make your closing argument on behalf of the Defendant.

MR. HOOD: I don't know what Mr. McKinney's background is, but I do think that this stage of the proceeding which is important in my life, important in your life and important in Robyn Parks' life is something that we shouldn't be making half jokes and ironic statements. This is the time when the system comes to work and we come to work with it. We've talked about bothering your conscience; and I've been in a situation of killing more people than probably a lot of people in this room because I had to go to Vietnam and do it. You talk about bothering your conscience, that's

bothered my conscience ever since that time. It will bother my conscience as long as I live. There is nothing worse than knowing that you had something to do with the killing of another human [709] being. You talk about bothering your conscience, some people that I know that I was in Vietnam with have still never recovered from the pangs of conscience of what they were required to do. I know I haven't; and I know I won't.

It seems to me that the situation that we've got is that Mr. McKinney's trying to tell you that you've got three aggravating factors which could allow you to tell somebody down in McAlester to roll up Robyn Parks' sleeve and inject him with a barbiturate -- a fast-acting paralytic

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agent -- while strapped in a chair. They could allow you to do that; and under the law which I wrote, they could. However, nothing in this law says you have to do it. You are the people who are going to determine whether it's done.

I heard Mr. McKinney say if anybody does this, he must suffer death. It's not true. It's not true at all. I, of course, had different feelings about, you know, the issue of guilt or innocence, but that's over. You decided that, and that's part of the system. That's an issue that we have to live with. Of course, I wouldn't be, I guess, supposed to understand that because I'm too close to the situation, I'm too close to the Defendant and I'm too close to this

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whole case from that side. So I, you know -- just the fact that I don't understand that verdict, shouldn't influence you, and I'm not asking you to make that a matter that you consider. But what you are considering now is something that I do understand, and [710] that's his life.

Robyn Parks, at the time that Ibrahim Abdullah died, was 22 years old, has been in the Oklahoma County Jail ever since then. He was 22 years old. When I was 22 years old, I was much in the position of David Boren, going to school, hadn't even started life. Robyn Parks hadn't even started his life. Robyn Parks did, however, start with quite a bit of background that I didn't have the bad fortune to possess. He started out with a family

that was split-up and far-flung, and he started out with going to schools where he wasn't wanted, and during a time when court-ordered bussing was the rule, and still is the rule in Oklahoma, and during that time -- I don't think I have to remind too many of you of what was going on during those times. There were a lot of people being abused in the line because of their race, both black and white.

I think that Mr. McKinney sells this jury short. I think that under his interpretation of the law, which I wrote in the legislature, all murders - all murders in the first degree would be punishable by the death penalty. Well, we used to have a law like that, and the Supreme Court struck it down. And now we have the law that Mr.

McKinney referred to, that Judge Cannon instructed you on, where it is not true; and one of the reasons it's not true is we found that the only people who were getting the death penalty were blacks. The great preponderance of the people who were actually being [711] executed were black. And the Supreme Court wanted to make sure that juries understood different kinds of homicides, and that juries understood what they could do, and that mandatory death penalties are unconstitutional and violate the constitutional statutes of the United States and the State of Oklahoma.

If Mr. McKinney's version were correct, if a single gunshot wound were a cruel, a heinous and atrocious method of committing murder, then I can

think of very few murders that would not fall under this death-penalty statute. I can think of very few murders in which a weapon was not used; and in that case, then aggravating factors would arise. As a matter of fact, there are very few other situations which I think of that would be relatively as painless as a gunshot wound. I've seen people expire because of gunshot wounds. I've had to put some of my friends in plastic bags because of gunshot wounds, and I didn't like it. The only thing that I can say to them -- say on their behalf is that they suffered very little pain, it was instant, it happened very fast and they were out of their misery. I've seen people in hospitals who were not so fortunate.

I think that the issue of whether this situation was a cruel, heinous or atrocious homicide -- I think there's absolutely no evidence on the record at all that it is. Sure, there is -- I've never seen a person die -- I've seen many of them die -- I've never seen one die without some gruesome [712] characteristics as the photograph Mr. McKinney distributed, which I think he distributed for the purpose of inflaming the passions and the prejudices and the emotion of the jury. You can't die without going through a situation where there's a loss of blood, and there's some unpleasant circumstances.

Let's go back the issue that's at hand in these Instructions. The definition of how the act which you as

a jury have determined is the act that killed the decedent, telling how the act itself was extremely wicked, shockingly outrageously wicked and vile. "A high degree of pain." I think the record is silent as to that. The Chief Medical Examiner never testified whether this person languished and died. I find it hard to believe that he did. It would seem by the very closeness to the heart, that the individual died rather quick and less painful death; but that's for you to decide. How could any other homicide, how could any other taking of a human life be as heinous, and as cruel and as atrocious? I don't think I have to invade the province of this jury, invade your minds to have you think of homicides that have been

horrendously cruel, and ghastly, and mutilation of the body. And these aren't pleasant things to talk about, but I have to talk about them because that's what this State is trying to tell you, is that this killing is so far off the end of the spectrum that it deserves the death penalty. We didn't write it that way. We wrote it so that the ones that [713] were heinous, and atrocious and cruel, that ones that were different, that were aggravating would carry the death penalty. Of course, I have no way of knowing how you determined, and on what basis, on what evidence you determined the issue of guilt or innocence, but to substantiate what Mr. McKinney is asking you to do in Instruction No. 1, "that the murder was committed for the

purpose of avoiding or preventing a lawful arrest or prosecution." You know, I certainly hope you didn't believe that -- I certainly hope you didn't believe that everything that was said on that tape or even a majority of the things that was said on that tape were true. You'd have to believe that to come and put a check on that box that says that's the reason -- that is the reason that this happened. And, I don't think that -- of course, I don't think I want to go over that again with you, I have no idea of knowing what it was that made you determine the guilt or innocence -- the guilt of Robyn Parks, but I would ask that you look at number two -- "for the purpose of avoiding or preventing a lawful arrest or prosecution."

I again ask you, what about that credit card? What about that whole credit card issue? Is it, as Mr. McKinney said, a situation where Robyn Parks tore off the top sheet of a credit card or took a printed credit card receipt when there was no-- absolutely no evidence that either had happened. As a matter of fact, there is evidence through the State's [714] Exhibit 17 that there wasn't any top sheet taken off. The top sheet's right there. It's just sitting right there. The thing's never been altered. It would seem to me that he's asking a lot of you, to determine that that is an aggravating factor. You'd have to assume just a heck of a lot, and I don't think this jury -- I don't think any jury wants to assume facts, wants

to assume anything that has to do with the life or death of a human being. I think it's something that has to be shown to you in big black-and-white letters. I don't think they want you to say, well, let's assume this so we can go ahead and execute him. Let's assume on number two we can go ahead and execute him.

Now, the third aggravating circumstance that Mr. McKinney talks about is "the existence of a probability" -- the probability-- "that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society." We certainly admitted that Robyn Parks has been what they call-- on the east side -- a hustler. He's been hustling probably for a great deal

of his life. He's been trying to make money, and he's done it illegally. However, the State has shown one fight -- or robbery, or whatever they want to call it -- where Robyn threw one or two punches, and wants to use that as evidence that he's going to be a continuing threat to violence for the rest of his life. He's 22 years old. His father testified that 20 years ago he went to [715] the penitentiary. His father, I think, is a good example of the fact that sending a human being to the penitentiary can be a beneficial act. I'm sure that many of you know enough about our system to know that in some instances it can't be. Some human beings don't respond the same way as others. But it can be something that can change a human being, if he wants

to change, and make him a great deal of a better person and a lot more productive than he's been.

The statistics that Dr. Ned Benton would give the committee would show that a high percentage of young black males in Oklahoma City are under supervision -- a high percentage. Now, there are probably plenty of reasons for that, I think you all know them, and I think it's understandable that Robyn Parks is one of them. It's not something that we like to talk about because it sort of shows a couple of holes in our society. It shows that we've got some problems that we haven't dealt with. That, in and of itself-- you may feel differently than I do, I feel very strongly that people like myself started off with a great deal in

this society and a great deal was expected of us. People like Robyn Parks started off with not a great deal, and not a great deal expected of him; and I think this has been borne out by the fact that Robyn Parks acts differently than we do, and I do; and that he has a different outlook. He doesn't have much of an outlook.

[716] You know, that the basic issue here, to me, is the responsibility that is going to be conferred upon you, to determine whether he's going to live very many more days or not. And, that responsibility -- which Mr. McKinney would say, of, that's not yours, don't worry about that, you're just part of the system -- that responsibility is squarely on your shoulders; and I made that argument when this death-penalty

bill was passed. I said, I'm not -- by voting for this bill, I'm not prepared to throw the switch on anybody. The juries are the ones that are going to do that. The law doesn't require it, the legislature never required it, and I think for a good reason. What they did was, they gave it to the province of 12 people such as you to determine whether a man should live or a man should die, and they gave some guidelines to try to make that decision more rational and less emotional.

But, you know, one of the things that still bothers me -- just still bothers me as much as probably anything that I've ever dealt with in the practice of law, is the idea that if somebody does this -- somebody does this, he must suffer death. That's a

code of Hammurabi, that's something that we've probably outgrown thousands of years ago. "An eye for an eye, a tooth for a tooth." That's not the religion that I learned, and that's not the religion that I think that very many of you learned. "An eye for an eye, a tooth for a tooth."

When David Boren, the Governor, called us into [717] special session to write this bill, he kept making a big deal about deterrents, saying that what you do by executing a person is to deter that kind of conduct in the future. Since the death penalty was written, the homicide rate in Oklahoma County has gone up.

Now, I don't know how you explain that, but I certainly don't explain it in terms of deterrents. I've never

believed that. I've just never seen anyone show me that homicides are deterred by what's written in those green books that Judge Cannon has in his office.

It would seem to me that when we go back to a quote from Voltaire, who once said that, "A measure of our society is not determined by how we treat our best people, but by how we treat our worst." I'm not saying that Robyn is our worst, but certainly Robyn Parks is many things -- has done many things that could categorize him in that area.

But does that mean that these twelve people have to determine that Robyn Parks should not live another day? I don't think so I know I could never-- I could never vote to extinguish someone's life. I don't think anybody

who's ever been involved in the taking of a human life, feels that justification to snuff out another person's life.

I know that the people in the armed forces who are required to do this are the ones who value human life the most because they know, you know, that the next person could be [718] them. They also know what it means to see a person in a situation where his days are numbered.

Some people -- and I think this is probably generally true all the way through the United States and anywhere else where people live -- some people never understand the value of life until their own is threatened; and some people just on, and on, and live their life and don't seem to pay a great deal

of attention to it until they realize that it could over very soon.

Senator Richard Newburger, from Oregon, made a statement talking about how he valued every little thing he did, every breakfast that he had in the morning, the conversations that he had with his wife, all these kinds of things, when he knew that his days were numbered. And, I understand that feeling very well myself because I've suffered a serious disease and I very well might not be around much longer, and I have a very deep feeling -- a very deep feeling for what life is, and how valuable it is, and how wrong it is for anyone -- anyone, to feel that they should be the complete arbiter or decider of whether another person

should live or whether another person should die.

And there is a -- there is a quotation that I think is very, very in point from the Lord of Rings trilogy that I've always admired, and it's talking about Gandolf the Wizard. It's talking about a person requesting that another person die. [719] It says, "Deserves it? I daresay he deserves it. Many that live deserve death, and some that die deserve life. Can you give it to them? Then do not be too eager to deal out death and judgment, for even the very wise cannot see all ends."

I would hate to be a member of this jury five years hence, when they find the person or persons who were

responsible for the killing of this person.

MR. MCKINNEY: If the Court please, that is improper argument. The jury has found that this person here did the crime.

THE COURT: Well, the jury knows that. So, any remark by either lawyer that's not backed up by the evidence should be disregarded. So I'll leave that up to the jury.

MR. HOOD: In other words, the verdict of death is irreversible, there is nothing that can be done in the future. I would say the certainty of it -- once all appeals are exhausted and it's carried out, it's final, it's complete and there can be no post-conviction relief from that, that's something that you'll have to decide.

But just -- the most important thing that I would like to say about this issue, that I think you've all thought about, I don't think there's a person in this room that hasn't thought about the death penalty. We had four jurors dismissed because they just couldn't give it. Of course, I think they [720] represent a segment of society that needs to be represented. There are many things --

MR. MCKINNEY: If the Court please, this is arguing the law.

THE COURT: That is an argument with the law -- that they were excused by the law.

Disregard that, ladies and gentlemen. Go ahead, Mr. Hood.

MR. HOOD: If I take any liberties in this argument, it's because it's the

most serious thing that I'm involved in, and I'm firmly and irrevocably opposed to the taking of a life for the taking of another life. I grew up that way, and I will stay that way. And, I don't know what's in each one of your minds, how you -- how your religious teachings taught you, but don't put them aside. There's no reason to put them aside. They're some of the most important things that make up who you are, and what you are and what you will become. This responsibility is on your shoulders.

Again, you may, by rendering a verdict of death, may be able to try to ignore it, and wash your hands of it, and say, well, you know, I sort of thought I was doing right, but I don't have to be responsible for executing

that person. But again, someone down in McAlester, hired by the State of Oklahoma, is going to have to inject a lethal substance into Robyn LeRoy Parks to cause his death, if you do [721] decide, and that responsibility is on each and every one of you.

It's something that will stay with you for the rest of your lives, it's something that I think -- I can't imagine how a person could put out of his mind in a cavalier fashion.

Each and every one of you must feel that you could do, that you can be there and participate in this execution, to come back with a verdict of death.

Now, I've had an opportunity over the last four years to work with the prison system that would -- that we

created in the last four years, and there is a place for, Robyn Parks in that prison.

There is a place for him because we've tried to make places for young people who've committed all kinds of crimes, to try to get them back into society, and not have them be a drain on society, and to have them come out with some kind of skills, and some kind of education, some kind of training, and some kind of an appreciation for what it is that he's supposed to do in this society that all of us belong in.

We're all in the same society. Some of us may feel we're in a different part of the society, but we're all in this thing together.

And I would say to this jury that if this jury returns a verdict of life

imprisonment, that the systems that we have built up, the programs that we have created, and the [722] institutions that we have funded can take care of Robyn LeRoy Parks, and should.

We talked about the death penalty as a punishment, kind of a punishment to Robyn LeRoy Parks, and a deterrent to other people.

Well, I think Norman Cousins said it best, "Death is not the greatest loss in life. The greatest loss is what dies within us while we live."

If you choose to execute Robyn Parks, you're not punishing him. You're freeing him. As Martin Luther King had said, "Free at last. Free at last. Thank God almighty, I'm free at

last." You're not punishing Robyn Parks by doing that.

I would ask that the human kindness, the very human nature that everybody brought into this Courtroom, would allow Robyn Parks to go to prison, and to mature in prison, and hopefully, as many others have done -- and when the death penalty was no longer with us, in cases in which the death penalty was not imposed, to give him a chance to make him the kind of human being that you would want to see him being.

I don't know -- I feel so incapable of trying to get across to you the emotion that I feel about this situation, the enormity of the consequences that are involved, the seriousness of what it is that you're about to do, and, I guess, really, that

each one of you has some strong feelings [723] one way or the other about how this will be accomplished.

I just plead, as I have pled before -- I plead Robyn's case, and I will plead with you to give Robyn a sentence of life in prison.

Mr. McKinney would -- of course, I don't have the last word. This is always very difficult in defending a case because I get neither the first nor the last word.

I would anticipate that Mr. McKinney would say, well, why didn't Robyn LeRoy Parks think about this at the time of the alleged homicide; and I would say, whether he did or whether he didn't, this group of twelve people doesn't have make two wrongs to make a right.

This group of twelve individuals doesn't have to violate its conscience to please the District Attorney's office, who has asked for this; and to give a little mercy, a little clemency to the person whom I've come to know, and I don't think needs to or deserves to die.

Thank you.

THE COURT: All right, Mr. McKinney, you may make your closing argument on behalf of the State.

MR. MCKINNEY: If it please the Court, ladies and gentlemen of the jury, I'll be rather brief; and most of the Defendant's arguments does not even deserve an answer.

Basically I gather this, David Hood is opposed to the death penalty under any kind of circumstances, although

[724] apparently he voted for it. I don't remember at the time when it was -- they had the special session of the legislature, of what his views are, but if he did vote for it -- and I think it's quite apparent to us today, that he did it with the expectations that there would never be that kind of a case in which a jury should impose a death penalty.

You see, that's not the argument here today. All twelve of you do believe in the death penalty as opposed to the fact that David Hood doesn't believe in it. So, you know, for him to get up here and make that kind of an argument, hopefully, it has fallen on deaf ears, because this is not the forum to argue for or against the death penalty.

Wouldn't it -- as the Court told you in the voir dire, we might as well burn the Courthouse down if we can't have a trial in which we've got twelve jurors that say that they, in good conscience, if the evidence warrants it, without doing violence to their conscience, can assess the death penalty. And now he gets up here and argues to you that never, under any circumstances, should the death penalty ever be imposed.

Now he tries to bring in the picture that the ones that are prosecuted the most are blacks. Since this new death-penalty law has come into effect our office, and I've been in on most of them, have prosecuted and secured the death penalty in eight cases, and over fifty percent of them [725] were white.

We don't prosecute whites, we don't prosecute blacks, we don't prosecute Jews, we don't prosecute any kind of nationality, we prosecute the person that committed the crime, you know.

It doesn't make any difference as to the color at all, that doesn't enter into it at all, and over fifty percent -- and I disagree with his figures when he tells you that most of them, the majority were black who received the death penalty, and I say that's not true.

It's not true here in Oklahoma County, and it's not true nationally, either. It's the crime that's the important thing, not what color or nationality a person is. And he says I'm selling the jury short. Well, I'm not selling this jury short at all.

He says that most of us don't understand what life is until their own is threatened. Now, he's coming closer to the truth right there, and more believable to me, than just about anything else he said in his closing arguments.

His closing arguments are really a pitch to you for sympathy -- sympathy, or sentiment or prejudice; and you told me in voir dire you wouldn't do that.

Well, it's just cold turkey. He either did it or he didn't. He either deserves the death penalty or he doesn't, you know. You leave the sympathy, and the sentiment and [726] prejudice part out of it.

But life being as is -- sometimes maybe I, myself, think of it in those terms. Death doesn't -- it's a casual

thing, sometimes. We read in the paper that someone's been killed, and we think of it in an abstract way. Okay, somebody got killed.

But when it's one of our loved ones -- well, now like you here in this case here, some of you read about it at the time it happened, and heard it on the news media or something, but as you sat here in the jury box, you couldn't really remember very much about it except that you knew it happened.

But Mr. Ibrahim's family -- that it was so near, and, dear, and so close to their hearts that they had lost a loved one, that until their dying days, they will carry a sorrow in their heart because of what happened to their son.

And, that's why I say that probably we don't understand life until your own

is threatened. We don't understand Mr. Ibrahim's life until someone that's near and dear to us is threatened.

Any of you that work or have friends that work -- I don't believe any of you work in convenience stores or filling stations or anything like that, but I'm sure you know people that have friends that do -- and really, until you stop and think about it, you don't consider that in the still of night, the same thing might happen to them. Even though it [727] has happened now, and it's happened before, and will happen again unless we do something about it, you know.

And Mr. Hood talks about the deterrent, and tongue-in-cheek, he voted for the bill, apparently, but our Governor and the other members of the

legislature and law enforcement -- at the time that bill was being considered and passed out there, was talking to them, now look, if we don't have a death-penalty law, there's going to be no deterrent in killing a witness in the hopes that you would avoid prosecution, there would be no deterrent if you're going to rob somebody or you're going to take a stolen credit card and think you're going to get caught, and because of that you would kill somebody, and there's no deterrent for the fact that you've killed them. In other words, your punishment would be about the same, anyway.

So you've got to have a deterrent. You've got to send the word out here-- and not only in Oklahoma County, but

all over the nation -- that if you do these things in Oklahoma County -- it's like I told you, since the new death-penalty law, right here in Oklahoma County we've had eight death penalties.

We have strong jurors here in this county that believe in the death penalty, irrespective of Mr. Hood's belief. His beliefs as to the death penalty have no business in this case at all. No matter how seriously he opposes it, he voted for it.

[728] But you know the remarkable thing, when he talks about the great feeling for what life is -- and I have such a feeling for what Mr. Ibrahim's life was to him, what he was trying to accomplish in this great United States of ours, so much more advanced than his country, and what he had hoped to

accomplish, and what a great feeling for life he must have had, to have it taken away from him in just a short moment's time..

You aren't doing anything to please the District Attorney's office when you assess the death penalty. It's a tragic necessity. And it's so regrettable to our office that the situation has come up, and in an instant a person has lost his life, and it's a tragedy. It's a tragedy that we have to have had this case at all and be in front of a jury.

So, you know, I haven't even thanked you for your verdict. You don't really -- no one deserves thanks for doing their duty. We are appreciative. We are appreciative for the fine work the police department did, and we're

appreciative of the great work you've done, but you aren't doing anything to please the District Attorney's office. It has got nothing do in this case.

We are sorrowful that you do have a duty that you must perform, because you will remember this case, and you'll remember it the rest of your life, and you'll remember whether or not a horrible tragedy occurred and the man that did it sat [729] before you.

And Mr. Hood talks about that when-
- it sounded to me like he said when he gets down there and they put him through a few programs and everything, and he's ready to return and walk the streets of Oklahoma City again, he'll be a changed man.

I wouldn't want to be working as an attendant in a filling station and

sitting in a booth in the still hours of the morning and have him come up and get gas and start walking over towards my window. I wouldn't want it.

You wouldn't want a loved one of yours in that position, I don't care how many years went by before that happened.

And, you know, I was in World War II, and I was overseas. I was over in Guam in the 20th Air Force. I was a part of the Air Force when we bombed Japan, and we took a lot of lives over there. And Mr. Hood went over to Korea (sic), and it sounded as though he-- he did, too.

And as he said, that those of us that were required do those things why was it done? Wasn't it so much better to have those wars fought on foreign

soil than right here in these United States where your lives would have been endangered, and your loved ones would have been endangered? But the most important thing of what he said to you was, that we have not recovered from what we were required [730] to do. See, we did that as a duty. We did that as a -- actually, as far as I was concerned -- as a willing duty. Not that I wanted to see anybody die, but it was something that in order to protect the peace and safety of you and the loved ones that I had back home and the loved ones that all of you have.

We that did fight in World War II and that fought in the Korean War-- or, the Vietnamese War, we did those things that duty required us to do.

And, if we are to have an effective death penalty, under this evidence, you must do what you are required to do under the law and under the evidence. If this is not a proper case where a person is executed -- just plain executed -- an execution murder.

How would you like to have a loved one working in a restaurant, for instance, and all at once somebody comes in there and snuffs out their lives?

We must have the protection of the death penalty, and we must have jurors that are strong enough to say, when that kind of a case is laid in front of us, and somebody has just plain executed, then we must, under the law and under the evidence, under a proper case, we must return the death penalty.

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Thank you.

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PETITIONER'S BRIEF

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No. 88-1264
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988



JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

ROBYN LEROY PARKS,
Respondent.

PETITIONER'S BRIEF-IN-CHIEF

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June, 1989
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QUESTION PRESENTED

Whether in the sentencing phase of a capital murder prosecution the Eighth Amendment prohibits an "anti-sympathy" jury instruction which states, in pertinent part:

You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as juror impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

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ROBYN LEROY PARKS,
Respondent.

PETITIONER'S BRIEF-IN-CHIEF

Robert H. Henry, Attorney General of
Oklahoma, respectfully submits this as
the Brief-in-Chief of the Petitioner
Warden of the Oklahoma State
Penitentiary.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals sitting en banc (Appendix A to Petition for Writ of Certiorari) is reported as Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988). The panel opinion of the Court of Appeals is reported as Parks v. Brown, 840 F.2d 1496 (10th Cir. 1987) (Appendix B to Petition for Writ of Certiorari). The opinion of the District Court (Appendix C to Petition for Writ of Certiorari) is not reported.

JURISDICTION

The judgment of the Court of Appeals sitting en banc was entered on October 28, 1988. The Petition for Writ of Certiorari was filed on February 6,

1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL
PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

The Oklahoma Court of Criminal Appeals summarized the facts of Respondent's murder of Abdullah Ibrahim as follows:

At approximately 4:30 a.m. on August 17, 1977, the victim, Abdullah Ibrahim was found shot to death on the floor of the Gulf Service Station where he was employed. An unused charge slip bearing various notations on both the front and back, which was apparently used as a scratch pad to compute the customers' purchases and figure tax, was found at the scene of the homicide by an investigating police officer. This same charge slip also had a license tag number written across the front of it, XZ-5710. It was subsequently determined that the owner of the vehicle bearing that license tag number was Robyn LeRoy Parks.

On August 29, and 30, 1977, James Clegg, an informant, allowed representatives of the State to tape two phone conversations that Clegg had with the appellant who was then in San Pedro, California. During the course of the August 29th

telephone conversation, Parks told Clegg that he shot Abdullah Ibrahim because Ibrahim had written down his tag number and Parks was afraid Ibrahim would call the police when he realized Parks' credit card was hot. During the August 30th phone conversation, Parks revealed the location of the gun that he used to shoot the victim. At that location, a .45 calibre pistol in a holster and a box of .45 calibre ammunition was found by Clegg who was accompanied by a police detective.

Robyn Parks testified in his own defense that the answers he gave on the two tapes were not true, that he had made the incriminating statements in order to protect his family from further harassment. He claimed that on an earlier day he had obtained gas at the station and because he did not have the money with which to pay, the attendant wrote down his license tag number. He returned the same night to pay for the gas. He further testified that on the night of the murder, he had stayed at the home of Elaine Sheets.

During the second stage of the trial, the State offered three aggravating circumstances to justify imposition of the

death penalty. In mitigation, the State offered the testimony of Robyn Parks' father. The jury found one aggravating circumstance, that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

Parks v. State, 651 P.2d 686, 689 (Okla.Crim.App. 1982).

Penalty Phase Instructions
and Argument.

With regard to mitigating circumstances, Instruction No. 6 in the sentencing phase stated:

You are further instructed that mitigating circumstances, if any, must also be considered by you, and although they are not specifically enumerated in the statutes of this State, the general law of Oklahoma and the United States sets up certain minimum mitigating circumstances for you to follow as guidelines in determining which sentence should be imposed in this case. You must consider all the following minimum mitigating circumstances and determine whether any one or more of them apply to all of the evidence, facts and circumstances of this case. You are not limited in

your consideration to the minimum mitigating circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine.

The minimum mitigating circumstances are:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
4. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;
5. The defendant was an accomplice in a murder

committed by another person and his participation in the homicidal act was relatively minor;

6. The defendant acted under duress or under the domination of another person;
7. At the time of the murder the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease or intoxication;
8. The age of the defendant at the time of the crime.

Jt. App. 10-12, R. Vol. II, Instruction No. 6 (emphasis added).

Instruction No. 9 in the sentencing phase stated in part:

You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as juror impartially, conscientiously, and faithfully under your oaths and return such

verdict as the evidence warrants when measured by these Instructions.

Jt. App. 13, R. Vol. II, Instruction No. 9.

Mr. McKinney the Prosecutor, stated during the opening penalty phase argument:

Now the Court has laid down some guidelines to put in front of you. They're -- you know, I'm not going to comment an awful lot, but just briefly. They're the guidelines that -- in explaining these Instructions-- the Court has told you that these are the aggravating circumstances you must consider. Now before you would be authorized to even think about giving the death penalty, you must find that one of the aggravating circumstances existed. (Emphasis added) (Jt. App. 16-17, Tr. Vol. V, pp. 695-696).

Mr. McKinney went on to explain why the evidence justified each of the

three aggravating circumstances set out in the bill of particulars (Jt. App. 17-26, Tr. Vol V, pp. 696-701).

Thereafter, Mr. McKinney stated:

Now, the Court has also given you that once you have decided on aggravating circumstances -- and of the three that's listed, before you can consider the death penalty, you must consider and agree that there is one -- at least one aggravating circumstance. You can consider -- you can find that there's one, or there's two or that there's three; but you must find one before you can consider the death penalty. Now once you've found at least one, then you must go, under the law, over to the mitigating. (Emphasis added) (Jt. App. 26-27, Tr. Vol. V, p. 701).

First, Mr. McKinney argued that the mitigating circumstance that the defendant had no significant history of prior criminal activity did not apply (Jt. App. 27-28, Tr. Vol. V, p. 701).

Next, Mr. McKinney argued that the evidence did not support the mitigating circumstance that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance (Jt. App. 28, Tr. Vol. V, p. 702). Next, Mr. McKinney stated:

And "number three" -- you see, the Court has to give these. The law says he's got to give them, and this is the law, and you must consider them. (Emphasis Added) (Jt. App. 28-29, Tr. Vol. V, p. 702).

Then Mr. McKinney argued against each of the remaining minimum mitigating circumstances in turn: that the victim was a participant in the defendant's homicidal conduct (Jt. App. 29, Tr. Vol. V, p. 702); that the murder was committed under circumstances which the defendant

believed to provide a moral justification or extenuation of his conduct (Jt. App. 29-30, Tr. Vol. V, pp. 702-703); that the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor (Jt. App. 30, Tr. Vol. V, p. 703); that the defendant acted under duress or the domination of another person (Jt. App. 31, Tr. Vol. V, p. 703); that at the time of the murder the capacity of the defendant to appreciate the criminality, the wrongfulness, of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or intoxication (Jt. App. 31, Tr. Vol. V, p. 703); that the age of the defendant at the time of the crime (Jt. App. 31,

Tr. Vol. V, p. 703). Thereafter, Mr. McKinney stated:

And, now the Court also tells you, you can consider anything else that you want to, to mitigate the penalty of death and the term of life. You can consider anything you want to in addition to what he's told you. And, then in your consideration - now here's my main point -- in your consideration of all of these things or anything else you want to consider -- "and determine whether one or more of them apply to all the evidence, facts and circumstances of this case." In other words, whether or not you feel like that these mitigating circumstances are so strong in favor of the Defendant that it's just going to eliminate and do away with the aggravating circumstances (Jt. App. 32-33, Tr. Vol. V, pp. 703-704).

SUMMARY OF THE ARGUMENT

The Eighth Amendment law of this Court has established two constitutional prerequisites for a valid death penalty: sentencers may not be given

unbridled discretion in determining sentences and the defendant must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." This case meets both of these prerequisites. The "anti-sympathy" instruction attacked in this case would not trick a reasonable juror into disregarding the Respondent's evidence in mitigation because the instruction merely counselled the jury away from sympathy and toward an impartial, conscientious and faithful discharge of its duty to render such verdict as the evidence

warranted. Necessarily the instruction required a consideration of the evidence in mitigation and in aggravation. The challenged instruction furthered the Eighth Amendment goal of rational and reliable capital sentencing.

The Opinion of Court of Appeals would additionally require the jury to "consider fully" the Respondent's evidence in mitigation with a sympathetic frame of mind. The Court below made a major conceptual error by finding that mercy, humane treatment, compassion, and considerations of the unique humanity of the defendant were so intertwined with sympathy that

the prohibition on sympathy risked confusing the reasonable juror. However, the jury was never instructed on these laudable virtues and need not have been instructed on them. Thus, no reasonable juror would have been confused by the "anti-sympathy" instruction.

States may structure and guide the jury's consideration of mitigating evidence to help them discharge their awesome sentencing responsibilities. The instruction in question in this case neither prohibited the consideration of mitigating evidence nor risked confusing the reasonable juror regarding the duty to consider such evidence.

Instead, it instructed on the manner of such consideration away from emotional responses to the evidence and toward an impartial, conscientious, faithful discharge of the jury's duties. Such an instruction is constitutionally unobjectionable and this Court should reinstate the Respondent's death penalty.

ARGUMENT

PROPOSITION I

THIS CASE MEETS THE TWO CONSTITUTIONAL PREREQUISITES FOR A VALID DEATH SENTENCE.

In California v. Brown, 479 U.S. 538, 541, (1987), the Court defined the two constitutional prerequisites for a valid death sentence as follows:

The Eighth Amendment jurisprudence of this Court establishes two separate prerequisites to a valid death

sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972). Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." Eddings, supra, at 110, 71 L.Ed.2d 1, 102 S.Ct. 869, quoting Lockett, supra, at 604, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops 3d 26. Consideration of such evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, at 304, 49 L.Ed.2d 944, 96 S.Ct. 2978 (opinion of Stewart, Powell, and Stevens, JJ).

This case presents no issue regarding the first of these two prerequisites

because Oklahoma structures the discretion of capital sentencers by use of aggravating circumstances which must be found before the jury may consider the death penalty. Thus, in Respondent's case the jury's discretion was guided by the submission to it of three possible aggravating circumstances, one of which it found beyond a reasonable doubt.

Likewise, this case presents no issue of barring the submission of mitigating evidence to the jury. Unlike Eddings v. Oklahoma, 455 U.S. 104 (1982), or Skipper v. South Carolina, 476 U.S. 1 (1986), Respondent's jury was permitted to hear all of the mitigating evidence he wished to offer.

A. The issue in this case

Since the jury unquestionably heard all of the mitigating evidence the Respondent sought to present and unquestionably was instructed to consider it, the issue in this case revolves around what it means to "consider" aggravating and mitigating evidence. Thus, the issue becomes whether or not the Eighth Amendment prohibition on cruel and unusual punishment requires jurors to "consider" mitigating evidence with sympathy, i.e. emotion? Or, may the State require jurors to "consider" mitigating evidence in a more sober fashion, that is, impartially, conscientiously, and faithfully? May the State structure and guide the consideration of mitigating evidence to achieve a "reasoned moral response" to

the defendant's moral guilt rather than an emotional response to the evidence and argument of counsel? We believe the Constitution requires consideration of mitigating evidence, rather than some heightened requirement that mitigating evidence be considered sympathetically.

B. The reasonable juror's view of this instruction.

Once again, we refer to California v. Brown, for our assessment of the challenged jury instruction. The question is what a reasonable juror could have understood the charge as meaning:

To determine how a reasonable juror could interpret an instruction, we "must focus initially on the specific language challenged." Francis v. Franklin, 471 U.S. at 315, 85 L.Ed.2d 344, 105 S.Ct. 1965. If the specific instruction fails constitutional muster, we then

review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law.

Id., 479 U.S. at 541.

Instruction No. 6 unambiguously told the jurors to consider the mitigating evidence, including the eight "minimum" mitigating factors as set out in that instruction plus anything else they might find to be mitigating. Reversing the two step analysis set out in Brown, supra, we find that the entire charge delivered a correct interpretation of the law. Thus, even if Instruction No. 9 were unconstitutional (a proposition we obviously contest) the charge as a whole cured any defect in it. Additionally, the prosecutor himself reinforced the jury's duty to consider mitigating evidence by working through

each of the eight "minimum" mitigating circumstances and telling the jurors they must consider those mitigating circumstances and see whether they were "just going to eliminate and do away with the aggravating circumstances" (Jt. App. 32-33, Tr. Vol V, pp. 703-04).

Returning to the first step of the Brown inquiry, we focus initially on the specific language challenged to determine how a reasonable juror could interpret that instruction. The challenged language of Instruction No. 9 states:

You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as juror impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants

when measured by these Instructions.

Jt. App. 13, R. Vol. II, Instruction No. 9.

The challenged instruction directs the jurors away from any influence of sympathy, sentiment, passion, prejudice or any other arbitrary factor and toward an impartial, conscientious, faithful performance of their duty. The instruction further tells the jurors to return such verdict as is warranted by the facts and the instructions. This instruction does not tell the jury to ignore the mitigating evidence, nor would a reasonable juror interpret the instruction as a "secret code" to ignore the mitigating evidence. Inclusion of the single word "sympathy" in a list of improper sentencing

motives could not reasonably lead a juror to ignore the mitigating evidence, especially in light of explicit instructions to consider such evidence which were buttressed by the prosecutor's argument itself.

Likewise, this instruction is not ambiguous and does not raise a substantial possibility that the jury would be confused into ignoring the mitigating evidence as was the case in Mills v. Maryland, 486 U.S. ___, ___, 108 S.Ct. 1860, 1865-66, 100 L.Ed.2d 384, 395-96 (1988). The instruction does tell the jury it should consider the evidence both in aggravation and in mitigation impartially and conscientiously, not emotionally, and further instructs the jury to return

such verdict as is warranted by the evidence and the instructions.

As in Brown itself, a reasonable juror reading Instruction number 9 as a whole would find the direction away from sympathy, sentiment, passion, and prejudice or other arbitrary factors as a direction away from the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty. Id., 479 U.S. at 543. As in Brown, Instruction No. 9 prohibits the jury from basing its decision on factors not presented at trial and irrelevant to the issues at the trial. Such an instruction does not violate the United States Constitution. Id., 479 U.S. at 543. Instead, as in Brown, Instruction No. 9 serves the useful purpose of

confining the jury's imposition of a death sentence by explicitly directing and cautioning the jury against reliance on extraneous emotional factors which would be far more likely to turn the jury against the capital defendant than for him. Like the instruction in Brown, Instruction No. 9 helps limit the jury's consideration to the evidence and the court's instructions and thus fosters the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in this case. Id., at 941. Moreover, by limiting the jury's sentencing consideration to record evidence the instruction also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the

sentencing process. Id., at 941. Significantly, Instruction No. 9 is evenhanded and protects both the State and the defendant from a verdict based upon sympathy, sentiment, passion or prejudice.

Thus, we may restate the issue in this case as follows: Does the Eighth Amendment prohibit a State from guiding and directing the way in which a jury considers evidence in aggravation and in mitigation with a particular frame of mind, that is, conscientiously and impartially rather than emotionally? Stated another way, does the Eighth Amendment require "sympathy" in capital sentencing?

C. Competing models of jury function and rational sentencing.

This restatement of the issue brings clearly into focus two conflicting

theories of what capital jurors must do and how they must "consider" evidence in aggravation and in mitigation in arriving at their sentence.

On the one hand, we may consider capital jurors using the "sympathy-emotional model" in which the jury may return a life verdict based upon emotional factors such as sympathy if the evidence or counsel's argument is emotionally powerful enough. This model makes capital sentencing an emotional tug of war in which the attorneys pull at opposite ends of the jurors' heart strings hoping to tug them over the "verdict" line. This model of jury functioning makes capital sentencing less rational and reviewable because it is based upon emotional

imponderables of the jury which do not appear in the record at trial.

On the other hand, capital jury functioning may be considered under the "weighing-balancing model" in which the jury arrives at a sentencing verdict by making a the reasoned moral response to the moral guilt of the defendant after weighing the aggravating factors against the mitigating factors. This model is more explicitly a moral judgment and more tuned toward rationality rather than emotional responses to evidence or argument. The weighing-balancing model is the superior model because it conforms more closely to the requirement that capital sentencing be, and appear to be, based upon reason rather than caprice or emotion. Booth v. Maryland, 482 U.S.

_____, _____, 107 S.Ct. 2529, 2536, 96 L.Ed.2d 440, 452 (1987) (disapproving emotionally charged victim impact statement).

The focus in capital sentencing should be upon the personal moral guilt of the defendant and not the emotional response of the jury to the evidence or the argument. The evidence submitted in a capital sentencing proceeding should have some bearing on the defendant's personal responsibility and moral guilt. Booth, 482 U.S. at _____, 107 S.Ct. at 2533, 96 L.Ed.2d at 448. Capital sentencing decisions should not be reached on emotional factors wholly unrelated to the blame worthiness of a particular defendant. Id., 482 U.S. at _____, 107 S.Ct. at 2534, 96 L.Ed.2d at 449.

Justice O'Connor's concurring opinion in Brown, correctly noted the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse and that the emphasis on culpability and sentencing decisions has long been reflected in Anglo-American law. Brown, 479 U.S. at 545. Justice O'Connor further correctly noted that a capital punishment sentencing decision should be "sensible to the uniqueness of the individual." Id., 479 U.S. at 545. We agree with her conclusion that the sentence imposed at the penalty phase should reflect a "reasoned moral response" to

the defendant's background, character, and crime rather than mere sympathy or emotion. Id. The individualized assessment of the appropriateness of the death penalty should be a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence. Id. The jury instructions - taken as a whole - must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime. Id. The instructions in the present case clearly did inform the jury to consider mitigating evidence and thus pass constitutional muster.

Judge Anderson, writing for himself and three others in the court below,

correctly hit upon the requirement from this Court's cases that capital sentencing must be rational and reliable as follows:

The requirement that sentencing decisions must be rational has been emphasized over and over again by the Supreme Court since Furman v. Georgia, 408 U.S. 238 (1972).

In Gardner v. Florida, 430 U.S. 349, 358 (1976), the Court stated: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." That standard has been referred to repeatedly by the Court in its later decisions. Sumner v. Shuman, 107 S.Ct. 2716, 2723, n.5 (1987) ("sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime" quoting California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring)); Booth v. Maryland, 107 S.Ct. at 2536 ("[A]ny decision to impose the death sentence must 'be, and appear to be, based on

reason rather than caprice or emotion."), quoting Gardner v. Florida, 430 U.S. at 358; "reasoned decision making" required in capital cases); McCleskey v. Kemp, 107 S.Ct. 1756, 1789 (1987) ("[W]e have demanded a uniquely high degree of rationality in imposing the death penalty." (Brennan, dissenting)); Caldwell v. Mississippi, 472 U.S. 320 (1985) ("[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Id. at 329; "[T]his Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Id. at 329, n.2, quoting Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)); Pulley v. Harris, 465 U.S. 37, 53 (1984) (upholding the constitutionality of a state statute which guaranteed that the jury's discretion will be guided and its consideration "deliberate"); California v. Ramos, 463 U.S. 992, 1018-21 (1983) (Marshall, dissenting)

(capital punishment decisions must be "rational," "meaningful," "principled," and "reliable"); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (death sentence must be based on reason rather than caprice or emotion, quoting Gardner v. Florida, 430 U.S. at 358); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (reason rather than caprice or emotion required); Gregg v. Georgia, 428 U.S. 153, 190 (1976) ("reasoned determination" by a jury); Jurek v. Texas, 428 U.S. 262, 274 (1976) (Texas procedure "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender.") (emphasis supplied); Proffitt v. Florida, 428 U.S. 242, 259 (1975) ("[T]here shall be an informed, focused, guided, and objective inquiry into the question whether [a convicted person] should be sentenced to death.").

Opinion of Anderson, J., concurring and dissenting in part, App. A at 18-22, 860 F.2d at 1569-70. Judge Anderson's summary of this Court's pronouncements on the need for rational and reliable capital sentencing drives home the

superiority of the "weighing-balancing" model of jury functioning over the "sympathy-emotional" model in providing a reliable judgment of a capital defendant's moral guilt. Moral guilt will be more reliably determined by minimizing emotional responses to the evidence. Such a system will better protect capital defendants in the long run because the tide of emotion runs strongly against them after their conviction for murder.

PROPOSITION II

THE COURT BELOW ERRED BY ADDING AN ADDITIONAL UNJUSTIFIED PREREQUISITE TO A VALID DEATH SENTENCE.

In addition to the two prerequisite to a valid death sentence summarized by this Court in Brown, the Court of Appeals added as a constitutional

requirement the demand that a capital jury "consider fully" the defendant's mitigating evidence with a sympathetic state of mind. The treatment of this issue by the court below amounts to a step backwards from this Court's insistence on rational and reliable capital sentencing.

The court below misapplied Mills v. Maryland, 486 U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) to the present case. In Mills the verdict form was ambiguous and could reasonably be read in two ways, one of which could result in a verdict of death when jurors found mitigating circumstances were present but did not agree unanimously on which mitigating factors those were. Id., 108 S.Ct. at 1866, 100 L.Ed.2d at 394. This Court found a substantial

possibility that the verdict rested on the improper ground and remanded for resentencing. Id., 108 S.Ct. at 1867, 100 L.Ed.2d at 395-96. The court below applied this "substantial possibility" language to the entirely different circumstance in the present case and remanded for resentencing because the jury verdict in this case may have rested on the "improper" (i.e. non-sympathetic) ground. App. A at 56-57, 860 F.2d at 1557.

Unlike the Mills jury, the jury in the present case was not in danger of being tricked into disregarding Respondent's case in mitigation. No reasonable juror could construe the admonition against sympathy, sentiment, passion, and prejudice, and in favor of an impartial and conscientious

discharge of their duty as jurors as an instruction to disregard the case in mitigation. Indeed, the challenged instruction explicitly called for "such verdict as the evidence warranted" and thus directed the jury once again to consider the evidence in mitigation and in aggravation. The instruction passes constitutional muster and the court below erred in striking it down.

While this is not a case in which the defense was precluded from introducing mitigating evidence or the jury was precluded from considering that evidence, the Tenth Circuit majority struck down the anti-sympathy instruction because it found that instruction created an impermissible risk that the jury did not fully consider the Respondent's mitigating

evidence in making its sentencing decision. App. A at 53, 860 F.2d at 1556. The court below went on to state that sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character. App. A at 55, 860 F.2d at 1557. Thus, the court below entered the realm of the mental and emotional processes of jurors to create a constitutional requirement that sentencing jurors not merely consider mitigating factors but "fully consider" them with a sympathetic attitude.

The upshot of the opinion of the court below is that the Court of Appeals claimed for itself the authority to set aside a death verdict if they believe that the jury did not

"fully consider" the mitigating evidence, even in the absence of any indication that mitigating evidence was withheld from the jury or that the trial court or prosecutor mislead the jury as to its duty to consider the mitigating evidence. Indeed, in the present case the prosecutor reinforced the jury's duty to consider mitigating evidence by discussing each of the minimum mitigating factors in turn and explaining why that factor did not apply.

The approach of the court below shifts the focus of the sentencing decision from the jury to the federal court. The judiciary is permitted to substitute its view of the proper sentence for that of the jury. Ironically, this approach may make

capital sentencing less reliable because it rests on the sensibilities of the federal judiciary rather than on objective evidence which appears in the record. Because the deliberations of the federal judiciary are rightly secret, sentencing decisions made by appellate federal courts occur truly within a "black box" into which the public cannot see. Appellate court decisions, made long after trial and often made for reasons so technical as to bewilder the public, divorce the punishment from the evidence establishing guilt.

The Court below abstracted "mercy", "humane" treatment, "compassion," and considerations of the unique "humanity" of the defendant from various of this Court's opinions, none

of which require "sympathy" in capital sentencing, and concluded, unaccountably, that these considerations were sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. App. A at 48-50, 860 F.2d at 1555-56.

This approach contains a major conceptual error: the jury had not read this Court's cases or been instructed upon them. The jury particularly had not read this Court's cases in the manner endorsed by the majority of the Court below. The jury was not instructed (and properly so) that it should sentence the defendant with "mercy", "humane" treatment,

"compassion," and consideration of the unique "humanity" of the defendant.

No reasonable juror would be confused because of some supposed inconsistency between mercy (and the other values which concerned the court below) and the instruction against sympathy and in favor of a conscientious verdict based upon the evidence and the instructions.

The Court below compounded the error by resorting to the dictionary to link "mercy," "compassion," and "humane" sentencing with a need for, among other things, "a 'deep feeling for and understanding of misery or suffering'" and " '...a ready inclination to pity, sympathy, or tenderness.'" App. A at 50, 860 F.2d at 1556. We know of no constitutional requirement that juries

be instructed to sentence murderers with deep feelings for misery or suffering or with tenderness. These jurors were not so instructed and cannot conceivably have been confused by some supposed conflict between an instruction they did not hear favoring tenderness in sentencing and the admonition against sympathy and in favor of a conscientious verdict. The court below took this Court's pronouncements, gleaned from various cases dealing with the need for guided discretion and consideration of mitigating evidence, and imposed them on an entirely different context: the mental state supposedly required of the jury by the Eighth Amendment during capital sentencing. None of the constitutional authority relied upon by

the court below compels the conclusion that the Constitution requires jurors to deliberate with a sympathetic mind. The Court of Appeals believed that this Court "implicitly suggested" that sympathy which is based on the evidence is a "valid consideration" in capital sentencing that cannot constitutionally be precluded. Id., App. A at 37, 860 F.2d at 1553. However, we do not read this Court's opinion in Brown to contain such a suggestion. Quite the contrary, this Court considered the factors proscribed by the instruction in Brown as a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty. 479 U.S. at 543.

Likewise, the reliance of the court below upon the distinction between the Brown instruction's "mere" sympathy and in the present instruction's "any influence" of sympathy is misplaced. App. A at 38-40, 860 F.2d at 1553. The instruction challenged herein could not trick a reasonable juror into ignoring mitigating evidence and indeed advances the Eighth Amendment's requirement of reliable sentencing. Sympathy is not a constitutionally protected value and is in fact an improper influence in capital sentencing. Thus, the difference between "mere" sympathy and "any influence" of sympathy is immaterial and would doubtless be lost on a lay juror required to distinguish between the two.

The State may structure the

consideration of aggravating and mitigating circumstances.

If, as we believe, the Eighth Amendment does not compel capital jurors to "consider" aggravating and mitigating evidence with some heightened degree of sympathy, may the state structure the way in which jurors consider that evidence by directing that the evidence be considered conscientiously and impartially under the evidence and instructions rather than with sympathy? We believe so. In a somewhat different context a plurality of this Court stated:

We find unavailing petitioner's reliance on this Court's statement in Eddings, 455 U.S., at 114, 102 S.Ct., at 877, that the sentencing jury may not be precluded from considering "any relevant, mitigating evidence." See Tr. of Oral Arg. 15. This statement leaves unanswered the question: relevant to what? While Lockett, supra,

438 U.S., at 604, 98 S.Ct., at 2964, answers this question at least in part-making it clear that a State cannot take out of the realm of relevant sentencing considerations the questions of the defendant's "character," "record," or the "circumstances of the offense" - Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. See Booth v. Maryland, 482 U.S. ___, ___, 107 S.Ct. 2529, ___, 96 L.Ed.2d 440 (1987). Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities. And we have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required. See Zant v. Stephens, 462 U.S. 862, 875-876, n. 13, 103 S.Ct. 2733, 2741-2742, n. 13, 77 L.Ed.2d 235 (1983) (emphasis added).

Franklin v. Lynaugh, 487 U.S. ___, ___, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155, 169 (1988). This Court has never held that jury discretion must be unlimited

or unguided, undirected or unfocused. Id., 108 S.Ct. at 2331. This Court has never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty. Id. Quite the contrary, this Court's cases have suggested that sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses and that death penalty schemes must be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Id., citing Brown, 479 U.S. at 541.

The Eighth Amendment requirements of rationality and reliability may incidentally impose limits on the

defense in the form of restraints on the emotionalism which is sometimes employed to get a favorable verdict. The burden of these restrictions on defense tactics is more than offset by the benefits of the increased reliability of capital sentencing with the corresponding (and likely greater) limits imposed upon the state's ability to whip up hostile emotion on the part of the jury.

This effort on the part of the defense to have the benefits of rationality and reliability in sentencing without the incidental limitations on their own tactics which go along with them amounts to seeking a unilateral advantage over the state. In effect, the defense wants the state to put on a rational and reliable case

devoid of appeals to emotion while the defense may resort to emotionalism in its own presentation. The defense desires the benefits of this Court's law on rational and reliable sentencing without the attendant incidental burdens which it must accept in order to receive the benefits, effectively seeking a large dose of the sweet without a little dose of the bitter.

As in the consideration of "residual doubts" in Franklin v. Lynaugh, 108 S.Ct. at 2334, 101 L.Ed.2d at 174 (opinion of O'Connor and Blackmun, JJ. concurring), states may permit capital defendants to capitalize on sympathy if they choose, but the Constitution does not require it. We do not suggest that the Constitution prohibits sentencing

juries from "considering" mitigating evidence sympathetically, we merely believe that the Constitution does not require sympathy in capital sentencing.

To require sympathetic consideration of murderers (or consideration with pity or tenderness as intimated by the Court below) moves us away from the rational and reliable focus on the defendant's moral guilt which has characterized this Court's capital punishment cases. Further, the requirement that the jury "consider fully" the case in mitigation as suggested by the Court below, 860 F.2d at 1556, leads us inevitably into the realm of the mental processes of the jurors where, short of a separate trial to investigate the knowledge and thinking of each juror, no method

exists to attain the certain knowledge of how "fully" the jurors considered the mitigating evidence. Mills, 108 S.Ct. at 1875, 100 L.Ed.2d at 406-07, (opinion of Rehnquist, C.J. and O'Connor, Scalia, and Kennedy, JJ. dissenting). Such a result is indeed contrary to the body of Eighth Amendment law, largely created for the protection of murder defendants, requiring rational and reliable capital sentencing. While such a result might spare this defendant, in the larger sense it would be a self defeating move which would condemn other capital defendants to a more emotional and less rational sentencing process.

CONCLUSION

The two prerequisites for a valid death penalty were met in the present case and the jury was correctly instructed to consider the evidence in mitigation by both the court's instructions and the prosecutor. The effort of the Court of Appeals to require "full" and sympathetic consideration of evidence in capital sentencing goes beyond the two constitutional prerequisites and imposes an unjustifiable and heightened requirement for sympathy in capital sentencing.

The instruction under attack in this case directed the jurors to discharge their duty impartially, conscientiously and faithfully under their oaths and return such verdict as the evidence

warrants when measured by the instructions. Such instruction is constitutionally unobjectionable. We respectfully ask this Court to reverse the judgment of the Court of Appeals and reinstate the death penalty of the Respondent.

Respectfully submitted,

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RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTION PRESENTED

In the specific context of this capital trial, did the penalty-phase instruction "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence" risk misleading the jury into believing that it was bound to ignore sympathy engendered by the mitigating evidence, in violation of *Lockett v. Ohio*?

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STATEMENT OF THE CASE

I. Introduction And Course Of Prior Proceedings

Respondent Robyn Leroy Parks was sentenced to die for the single-gunshot killing of a gasoline service station attendant. After deliberating several hours, the sentencing jurors rejected two of the three alleged aggravating factors. They declined to conclude that respondent would probably commit violent crimes in the future, thus posing "a continuing threat to society," or that the murder was "especially heinous, atrocious or cruel." Ultimately, the jury found that the murder had been "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." *See generally* 21 O.S. § 701.12 (1983).

The Oklahoma Court of Criminal Appeals affirmed the judgment on direct review. *Parks v. State*, 651 P.2d 686 (Okla. Crim. App. 1982), *cert. denied*, 459 U.S. 1155 (1983). It also upheld a lower court's later refusal to grant an application for post-conviction relief.¹ *See Parks v. Oklahoma*, 467 U.S. 1210 (1984) (denying cert.)

After exhausting his state remedies, respondent filed a petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma. That court denied his claims, and a divided panel of the United States Court of Appeals for the Tenth Circuit affirmed the

¹ That opinion appears in the record. Opinions issued by the federal courts in connection with this proceeding are contained, paginated separately, in Appendices A-C to the Petition for Certiorari ("App. _____"). Citations to other relevant material will be to the Joint Appendix ("J.A. _____"), where possible. Those portions of the trial transcript not reprinted in the Joint Appendix will be referred to by volume and page ("Tr. _____"). The court's guilt and sentencing charges ("G. _____" or "S. _____"), do not form part of the transcript but are included in the record and, in pertinent part, in the Joint Appendix.

order. On rehearing en banc, however, the court reversed and vacated Parks' sentence of death.²

II. Facts Relating To The Crime

Early on the morning of August 17, 1977, the attendant at a self-service Gulf station in Oklahoma City was found dead of a gunshot wound in the cashier's booth (Tr. II, 210, 213-14; Tr. III, 360). There were no witnesses to the killing, which had resulted from the firing of a single bullet by a .45 caliber pistol (Tr. III, 434-35). There were also no signs of a struggle, and no money had been taken from the premises (Tr. II, 235).

Subsequent investigation led the police to focus suspicion on twenty-two year old Parks (*see, e.g.*, Tr. II, 262-68; *see also* J.A. 44). On August 29 and 30, 1977, a former roommate, James Clegg, Jr., permitted the authorities to tape two phone conversations with respondent (Tr. II, 326, 309-309A, 318-19).³ In these conversations, respondent admitted shooting the attendant after the man had examined the license plate on his car; he also revealed the

² *Parks v. Brown*, 860 F.2d 1545 (10th Cir. 1988) (en banc) (App. A), *cert. granted*, 109 S. Ct. 1930 (1989). Judge Ebel authored the court's majority opinion. Part I was joined by six other judges; Part II, by five. Chief Judge Holloway wrote a concurring and dissenting opinion joined by Judges McKay and Seymour. In addition, the Chief Judge as well as Judge Seymour signed an opinion by Judge McKay, concurring in part and dissenting in part. Finally, Judge Anderson, writing for himself and Judges Tacha, Baldock and Brorby, also concurred and dissented in part. Since Judge Anderson's opinion expresses the minority view on the pending issue, unless the context indicates otherwise we will refer to it as the dissent.

³ The tape recordings were played to the jurors, who listened to them with the aid of transcripts (Tr. II, 339-46). The latter may be found in the record (Ct. Exh. 1 & 2).

location of the gun. Parks explained that he had acted in order to avoid arrest for using a "hot credit card" to buy gasoline (Tr. III, 507-14; Ct. Exh. 1, at 2-3, 12; Ct. Exh. 2, at 2-3).

III. Facts Relating To The Sentencing

The trial court charged the jury in the penalty phase:

You must avoid *any* influence of sympathy, sentiment, passion, prejudice *or other arbitrary factor* when imposing sentence. You should discharge your duty as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants *when measured by these Instructions* (S. 9, J.A. 13) (emphasis added).

In so doing, the court was repeating the substance of an earlier guilt-phase instruction: "You should not let sympathy, sentiment or prejudice enter into your deliberations . . ." (G. 10). The court also told the jury at the penalty phase: "All of the previous instructions given you in the first part of this trial apply where applicable and must be considered along with these additional instructions" (S. 9, J.A. 13).

The context of the court's instructions was as follows. Respondent's defense at the penalty trial consisted of evidence about his background designed to evoke the jurors' sympathy. His sole witness, his father, testified generally about "what kind of person . . . he has been" (Tr. V, 665). The elder Parks also specifically recounted the rootless and motherless childhood endured by the son, as well as his own availability to respondent during the period he spent in prison. Although at first describing Parks as a "happy-go-lucky guy" who "got along with everybody" (Tr. V, 668), the father then evoked some of the pathos of respondent's life. Abandoned by his natural

mother after his parents' marriage broke up, respondent had an unstable youth. From the age of "two weeks or two months until . . . maybe four years old," he lived with his paternal grandmother—shifting next, his father related, to "the wife that I had at that particular time," who kept him until he was about fourteen (Tr. V, 671). Notwithstanding the circumstances, the father tried to be a good parent to respondent, "help[ing] him to get employment, . . . to buy a 15-year old car that he could knock around in, advise [sic]—whatever I could do . . ." (Tr. V, 670). Yet the father himself served time while Parks was young, and thus could not act as a resource for Parks while he was in prison (Tr. V, 679).

Drawing on this record, defense counsel summed up at the end of the penalty trial by stressing respondent's youthfulness at the time of the crime. Counsel also noted that his client had "started off with not a great deal, and not a great deal expected of him" (J.A. 56). "Robyn Parks did, however, start with quite a bit of background that I didn't have the bad fortune to possess. He started out with a family that was split-up and far-flung, and he started going to school where he wasn't wanted" on account of racial tension arising from court-ordered busing (J.A. 44-45; *see also* Tr. V, 669, 691). Counsel concluded with a plea for mercy, based in part on the inference the jury could draw from the evidence that Parks was capable of rehabilitation:

I would ask that the human kindness, the very human nature that everybody brought into this Courtroom, would allow Robyn Parks to go to prison and to mature in prison . . . to give him a chance to make him the kind of human being that you would want to see him being.

I just plead . . . with you to give Robyn a sentence of life in prison . . . to give a little mercy, a little clemency to the person whom I've come to know, and I don't think needs to or deserves to die (J.A. 69-71).

Prosecutor James R. McKinney, on his part, had extracted a promise from prospective jurors during voir-dire that they would forswear *any* influence of sympathy in judging the case. He did not distinguish between the guilt and penalty phases of the capital proceeding:

MR. McKINNEY: Of course the Court will instruct you that you should not allow sympathy, sentiment or prejudice to enter into your deliberations. And frankly that's just as cold-blooded as you can put it.

You cannot allow your sympathy, sentiment or prejudice to influence you in this case and sit on this jury. And now is the time to find out if you will eliminate any sympathy, sentiment or prejudice in this case. Will all of you do that (J.A. 8-10)?

In his final summation at the sentencing phase, McKinney "called in" that earlier promise:

[Defense counsel's] closing arguments are really a pitch to you for sympathy—sympathy or sentiment or prejudice; and you told me in voir-dire you wouldn't do that.

Well, it's just cold turkey. He either did it or he didn't. He either deserves the death penalty or he doesn't, you know. *You leave the sympathy, and the sentiment and prejudice part out of it* (J.A. 75) (emphasis added).

The prosecutor had set the scene in his opening penalty-phase summation for the mechanistic argument equating sympathy with mitigation by stressing that *every* "

atrocious" murder requires that the murderer "suffer death" (J.A. 40).⁴

SUMMARY OF ARGUMENT

From the inception of modern death-penalty jurisprudence, the Court has stressed the importance of individualization as a cornerstone of reliable sentencing. In order to achieve these allied goals, the Court has insisted that capital defendants be permitted to present a broad range of mitigating evidence, including evidence of background and character unrelated to the crime charged. The Court has further made clear that the sentencer must be free to give such evidence full consideration and effect in its verdict and, toward that end, has consistently toppled artificial barriers of any kind that threaten to interfere with this process.

One sort of barrier to full consideration of mitigation consisting of general background evidence is a general anti-sympathy instruction telling jurors that they must ignore *all* sympathy, including that which arises from the record as opposed to extraneous emotional factors. This type of instruction is impermissible because, by preclud-

⁴ McKinney elaborated on this theme in the following passage:

But, you know, as you as jurors, you really in assessing the death penalty, you're not putting Robyn Parks to death. You have just become part of the criminal justice system that says *when anyone does this, that he must suffer death*. So all you are doing is you're just following the law and what the law says, and on your verdict—*once your verdict comes back in, the law takes over. The law does all of these things*, so it's not on your conscience. You're just part of the criminal justice system that says when this type of type of [sic] thing happens, that *who ever does such a horrible atrocious thing must suffer death*.

Now, that's man's law. But God's law is the very same. *God's law says that the murderer shall suffer death*. So don't let it bother your conscience, you know (J.A. 39-40) (emphasis added).

ing the very response which that evidence naturally elicits, it hinders their full "consideration of evidence that 'would be "mitigating" in the sense that [it] might serve "as a basis for a sentence less than death."'" See *infra* pp. 10-11.

In this marginal case for death, where respondent adduced mitigating evidence of his unstable, motherless childhood, an absolute anti-sympathy charge—reinforced by the prosecutor's own such "charge" and his comments globally equating sympathy with respondent's mitigating case and encouraging the jury to approach its task in a wholly mechanistic fashion—fell afoul of *California v. Brown*, 479 U.S. 538 (1987). That decision upheld an instruction construed to bar only factually untethered sympathy but plainly stated that the jury must be allowed to consider sympathy rooted in the evidence at trial. Most fundamentally, the anti-sympathy charge violated the bedrock principle of *Woodson* and *Lockett* that the sentencer must be permitted to consider the nature of the criminal, not only the crime, in deciding on a sentence of life or death.

ARGUMENT

WHERE THE COURT'S ABSOLUTE ANTI-SYMPATHY INSTRUCTION WAS REINFORCED BY THE PROSECUTOR'S COMMENTS IN A CASE IN WHICH NEITHER THE NATURE OF THE CRIME NOR THE CHARACTER AND RECORD OF THE DEFENDANT PRESENTED A STRONG ARGUMENT FOR DEATH, THE POSSIBILITY THAT RESPONDENT'S JURY CONDUCTED ITS TASK IMPROPERLY REQUIRES THAT HIS SENTENCE BE VACATED.

A. Introduction

If there has been one consistent theme to the Court's death-penalty jurisprudence in the modern era, it is the importance of individualizing capital sentencing deter-

minations. See W. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 6-8 (1987). As early as 1976, the watershed year in this area of law, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), made clear that "the fundamental respect for humanity underlying the Eighth Amendment" compels attention to the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Recognizing "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," *id.*, the Court has continually reaffirmed its commitment to the capital defendant's right to present and have the sentencer consider "'as a mitigating factor'" any relevant mitigating evidence that he wishes to "'proffer[] as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).⁵

Summing up this well-settled doctrine, Justice Blackmun's majority opinion in *Mills v. Maryland*, 108 S. Ct. 1860, 1866 (1988), noted that barriers to consideration of mitigating proof will be overturned whether they are imposed by statute, *e.g.*, *Lockett*, by the sentencing court, *e.g.*, *Eddings*, by an evidentiary ruling, *e.g.*, *Skipper*, or by a charge or verdict sheet, as in *Mills* itself. In fact, this Term in *Penry v. Lynaugh*, *supra*, the Court vacated a capital sentence because defective penalty

⁵ See also *Penry v. Lynaugh*, 109 S.Ct. 2934, 2946 (1989); *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987); *California v. Brown*, *supra*, 479 U.S. at 541; *id.* at 545 (O'Connor, J., concurring); *California v. Ramos*, 463 U.S. 992, 1001 (1983).

instructions, incomplete as to mitigation, created a risk that death had been given "in spite of factors . . . call[ing] for a less severe penalty." *Id.*, 109 S.Ct. at 2952 quoting *Lockett*, 438 U.S. at 605, and *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring). The rule, therefore, is perfectly clear—such obstacles, whatever their form, call for reversal.

Equally clear is the rule's rationale. Unless sentencing courts or juries may hear defendants' mitigating proof, they will lack the data to "fully consider" whether a defendant should live or die.⁶ But even if they have the pertinent data, they cannot truly consider it "fully" unless they can also give it effect:

"[T]he right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration" in imposing sentence. *Id.* at 2948, quoting *Franklin v. Lynaugh*, 108 S. Ct. 2320, 2333 (1988) (O'Connor, J., concurring in the judgment).

Simply stated, only a sentencer accorded the freedom to react as well as listen to the defendant's evidence in mitigation can express its "reasoned moral response" to that evidence. See *Penry*, 109 S.Ct. at 2947-48, 2951-52; *Franklin v. Lynaugh*, 108 S. Ct. at 2333; *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). Ensuring the integrity of this response protects and enhances the ultimate goal of

⁶ "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Ramos*, 463 U.S. at 1003, quoting *Jurek v. Texas*, 428 U.S. 262, 276 (1976); see also *Gregg v. Georgia*, 428 U.S. 153, 204 (1976); see generally *Penry*, 109 S.Ct. at 2947-52 (discussing importance of "full consideration" of mitigating evidence).

reliability in capital sentencing. See *Woodson*, 428 U.S. at 305.

In a typical system like Oklahoma's, where lay juries determine penalty, the trial court's charge plays a critical role in safeguarding the process from error. See *Gregg*, 428 U.S. at 192-95. Error or ambiguity infecting instructions relating to mitigation poses especially grave dangers of dooming a defendant's hopes for mercy; so, too, does prosecutorial misconduct in this extremely sensitive area. In respondent's case—a close one on penalty—an anti-sympathy charge by the court, exploited by the prosecutor's remarks, erected a barrier to full consideration of mitigating proof about Parks' background. Since these circumstances compromised respondent's chance to obtain a reasoned moral response from the jurors who held his life in the balance, his sentence is too unreliable to stand.

B. The Inconsistency Of Absolute Anti-Sympathy Instructions With The Principles of *Woodson* And *Lockett* And *California v. Brown*

Even before *California v. Brown*, *supra*, the precedents were clear that a capital sentencer could not be forbidden to consider any proffered defense evidence tending to show "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, 428 U.S. at 304, quoted in *Shuman*, 483 U.S. at 74. Insofar as an instruction forbidding sympathy precludes the jurors from responding to such evidence by insisting they must put out of account the compassionate reaction which it is the very function of this evidence to elicit, that instruction impedes "the capital-sentencing authority's consideration of evidence that 'would be "mitigating" in the sense that [it] might serve "as a basis for a sentence

less than death.'" *Id.* at 76n.5, quoting *Skipper*, 476 U.S. at 4-5, quoting *Lockett*, 438 U.S. at 604; see *Hitchcock*, 481 U.S. at 397 (unanimous Court held that the following evidence had to be considered in mitigation: "petitioner had been one of twelve children in a poor family that earned its living by picking cotton"; "his father had died of cancer"; and he "had been a fond and affectionate uncle").

It therefore came as no surprise when, in *California v. Brown*, *supra*, the entire Court agreed that the critical question was whether the anti-sympathy instruction there, which directed the jury not to "be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," did or did not have this effect. See 479 U.S. at 539 (emphasis added). Chief Justice Rehnquist, writing for a majority of five who upheld the California instruction because they believed that the jury would have construed it to ban only "extraneous emotional factors," subscribed to the view of the four dissenters that sympathy rooted in the record at trial must be permitted to influence the sentence. See 479 U.S. at 542-43.⁷ Significantly, the dissenters in *Mills* (all of whom had formed part of the majority in *Brown*) described *Brown's* holding in just this fashion:

⁷ The dissenting justices, in two opinions authored by Justices Brennan and Blackmun, see *id.* at 547 (Brennan, J., with Marshall and Stevens, JJ., dissenting); *id.* at 551 (Blackmun, J., with Marshall, J., dissenting), would have invalidated the charge because they believed that, by its language and in its context, it effectively negated "the Court's requirement that all mitigating evidence be considered." *Id.* at 548 (Brennan, J., dissenting); cf. *id.* at 563 (Blackmun, J., dissenting) (when a juror is moved to show mercy to a defendant, an instruction "that he or she cannot be 'swayed' by sympathy may arrest or restrain this humane response").

[I]n *Brown* we found that a reasonable juror would reject the construction of the jury charge advanced by the defendant, and would instead understand that the trial judge's instruction not to rely on "mere sympathy" was "a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Mills*, 108 S. Ct. at 1874-75 (Rehnquist, CJ, dissenting) (citation omitted) (emphasis added).

Put simply, the *Brown* majority and *a fortiori* the *Brown* dissenters would have nullified any anti-sympathy instruction interpreted as "general," "all-inclusive" or "absolute"—in other words, as prohibiting factually tethered sympathy. See Ebel Opin., App. A, 37, 60, 68.

Justice O'Connor, who joined Chief Justice Rehnquist's opinion, wrote a separate concurrence as well. 479 U.S. at 544. She, too, stressed that the key issue in *Brown* was whether the challenged anti-sympathy instruction had the effect of precluding a reasoned moral response by Brown's jury to his mitigating evidence, a matter that she expressly left open to the California Supreme Court to determine on remand. *Id.* at 545-46. In addition, she emphasized that "one difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue in this case is that juries may be misled into believing that mitigating evidence about a defendant's background or character must be ignored." *Id.*

The Justice also characterized the sentencing process as "a moral inquiry" into the defendant's culpability, "and not an emotional response to the mitigating evidence." *Id.* at 545. Seizing on this slight difference in approach from that of the remaining members of the Court, petitioners posit two supposedly "[c]ompeting models" of jury sentencing. Pet. Br. 28 *et seq.* One, the "weighing-balancing

model," which petitioners approve, ostensibly describes the O'Connor method. The second, "'sympathy-emotional model,'" which petitioners reject, is ascribed to respondent and the Court of Appeals majority. Both polarities depict caricatures of pure rationality and hyper-emotionalism in sentencing. The latter does not represent the position of respondent or of the court below, while the former distorts Justice O'Connor's into a vision of capital sentencing preferred by petitioners but at odds with what the Court has endorsed.

In truth, for purposes presently relevant, there exists but a single death-sentencing "model," neither all heart—nor, as petitioners would have it, all head.⁸ Ironically, too, in light of petitioners' current tack, Justice O'Connor is the member of the Court who most recently limned this model's contours in *Penry v. Lynaugh*, *supra*, discussed above. See *supra* pp. 8-9. In that case, in countering the state's contention that a holding for Penry would herald a "return to the sort of unbridled discretion that led to *Furman v. Georgia*, 408 U.S. 238" (1972), 109 S.Ct. at 2951, the justice took pains to emphasize that "rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a

⁸ Naturally, individual judges and jurors will differ somewhat in their precise approaches to capital sentencing:

While the sentencer's decision to accord life to a defendant at times might be a rational or moral one, it also may arise from the defendant's appeal to the sentencer's sympathy or mercy, human qualities that are undeniably emotional in nature. *Brown*, 479 U.S. at 561-62 (Blackmun, J., dissenting); see also *Brooks v. Kemp*, 762 F.2d 1383, 1404-05 (11th Cir. 1985) (capital sentencing necessarily involves emotion), *vacated and remanded on different grounds*, 478 U.S. 1016 (1986).

“reasoned *moral* response to the defendant’s background, character and crime.”” *Id.* (citations omitted).⁹

⁹ *Booth v. Maryland*, 482 U.S. 496 (1987), is not to the contrary. Specifically, *Booth* does not require the total removal of emotion from the capital sentencing process. In the trenchant words of the majority below:

We reject [petitioners’] argument that *Booth* stands for the proposition that all sympathy must be eliminated from the jury’s decision making. Instead, we read *Booth* as holding only that the information in a victim impact statement, as distinguished from the background of the defendant, is irrelevant to the issues to be considered at the penalty phase of a capital case and that the potential for passion and prejudice from those statements is such that they may not be introduced. By contrast, the Supreme Court has made it clear many times that the defendant is entitled to present evidence of his character and background at the sentencing phase of his capital trial. Ebel Opin., App. A, 62-63 (citations omitted); cf. Anderson Opin., App. A, 17-18; Pet. Br. 29-31.

While barring certain facts as irrelevant, *Booth* in no way keeps the state from using evidence that is germane: that which concerns the character and record of the offender and the circumstances of the offense. Therefore, just as defendants may use such evidence to try to elicit the sentencer’s sympathy and empathy, see, e.g., *Hitchcock*; *supra* p. 11, prosecutors may use it to argue the tragic and heinous nature of the killing or the depravity of the killer; they may also call for retribution. See *Brooks*, 762 F.2d at 1404-07. Since prosecutors are not forbidden any recourse to human emotion, respondent is simply requesting *parity*—not, as petitioners spuriously claim, Pet. Br. 52-53, an advantaged position vis-à-vis the state. See *Brooks*, 762 F.2d at 1405 (fact that either defense or prosecutorial argument “has emotional overtones does not independently indict it as improper”).

In *Penry*, moreover, the Court divided over whether the state could restrict the way in which sentencing jurors looked at evidence—not whether they could look at it at all. Here, by contrast, the anti-sympathy instruction had the effect of putting respondent’s entire mitigating case beyond the jury’s consideration rather than merely limiting the purposes for which that case could be used by the jury. Cf. *id.*, 109 S.Ct. at 2968 (Scalia, J., concurring in part and dissenting in part) (“all mitigating factors must be able to be considered by the sentencer, but need not be able to be considered for all purposes”).

To sum up: minor variations along a spectrum of sympathetic or emotional versus intellectual or moral response have little consequence. What is critical is that the sentencer (here, the jury) not be prevented from reacting to the evidence as it feels minded and giving its reaction effect in the verdict. In respondent’s case, as the Court of Appeals correctly held, the “‘substantial possibility’” that the court’s absolute anti-sympathy instruction—uncured by the court’s charge as a whole and “exacerbate[d]” by the prosecutor’s statements—caused the jurors to ignore or slight his mitigating proof where they otherwise might have used it as a basis for granting mercy, renders his sentence fatally defective. See Ebel Opin., App. A, 53, 56-59, quoting *Mills*, 108 S. Ct. at 1867.

C. The Violation Of The Principles of *Woodson* And *Lockett* And *California v. Brown* In This Case

The majority below thus simply held that on the facts presented here, the anti-sympathy charge delivered to respondent’s jurors had the effect of excluding his evidence in mitigation from their purview. Echoing Justice O’Connor’s above-quoted comment in *Brown* on the “difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue,” *supra* p. 12, Judge Ebel remarked that “sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant’s background and character.” Ebel Opin., App. A, 55. Although petitioners misrepresent the majority’s holding and respondent’s claim throughout their brief as one of an Eighth-Amendment right to a sympathetic or emotional jury, see Pet. Br. 20, 37 *et seq.*, the right asserted is, of course, only to jurors who have not been barred from considering mitigating proof in a natural way: that is, with sympathy. If

jurors in a particular case choose not to react to such proof with sympathy—if they are skeptical or simply indifferent—that is *their* right, as Judge Ebel clearly recognized. Compare Ebel Opin., App. A, 61-62n.13 with Anderson Opin., App. A, 16.

Hence, as in *California v. Brown*, *supra*, in order to resolve this case the Court need only determine whether the Court of Appeals was correct in interpreting the challenged instruction (“You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence”) to preclude even factually tethered sympathy, in violation of the logic of *Brown* and the *Woodson-Lockett* line of decisions. It surely was, since this charge fails on every score deemed by the Court dispositive or even relevant in *Brown*.

First, as opposed to *Brown*’s instruction (“You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling”), the word “sympathy” lacked what Chief Justice Rehnquist dubbed the “crucial” modifier “*mere*.” See *id.*, 479 U.S. at 542. Unlike *Brown*’s jurors, respondent’s jurors were thus not told that they should disregard solely emotion “totally divorced from the evidence.” *Id.* To the contrary, since the judge gave a similar charge at the guilt proceeding, see *supra* p. 3, the jurors more likely concluded that at both phases of respondent’s trial the issues were wholly cut-and-dried—in other words, that the penalty trial, like the trial on guilt, involved purely factual matters rather than also a moral inquiry.¹⁰

¹⁰ While the Court of Appeals for the Fifth Circuit in *Byrne v. Butler*, 847 F.2d 1135 (5th Cir. 1988), and a few state courts have upheld post-*Brown* anti-sympathy instructions not containing the word “*mere*,” these decisions lend little or no support to petitioners. For one thing, their cursory discussion of the charge’s validity con-

Such an impression would plainly have been reinforced by the fact that the charge directed avoidance of “*any* influence of sympathy . . . or other arbitrary factor” (S. 9, J.A. 13) (emphasis added). As further distinguished from the language in *Brown*, the wording here clearly implied that all sympathy, not just sympathy with no record basis, fell within the catalog of arbitrary factors that the jurors were bound to ignore. The majority below made the point succinctly:

[W]e do not believe that the inclusion of the word sympathy in a list of obviously improper factors reduced the unconstitutional effect of the instruction in this case. In fact, it is likely that including the word sympathy with factors such as prejudice only served to denigrate it and to underscore its impermissibility. That conclusion is buttressed by the phrase “or any other arbitrary factor” at the end of the sentence, which suggests that sympathy is an arbitrary factor which should not be relied upon. Ebel Opin., App. A, 39-40.¹¹

trasts sharply with the careful opinion of the court below. See, e.g., *Byrne*, 847 F.2d at 1137 (summary disposition relying on the district court’s opinion); *People v. Emerson*, 522 N.E.2d 1109, 1122 (Ill. 1987) (two-paragraph treatment), *cert. denied*, 109 S. Ct. 246 (1988); *State v. Porterfield*, 746 S.W.2d 441, 450-51 (Tenn.) (one-paragraph treatment), *cert. denied*, 108 S. Ct. 1756 (1988). In addition, the ultimate validity of such instructions turns on details of wording and context peculiar to each individual case. See, e.g., *Byrne*, 847 F.2d at 1140 (trial judge seemingly gave charge in direct response to prosecutor’s argument designed to elicit sympathy for victim); *State v. Ramseur*, 524 A.2d 188, 276-77n.70 (N.J. 1987) (expressly relying on the “context of the entire charge”); *State v. Steffen*, 509 N.E. 2d 383, 396 (Ohio 1987) (sustaining the instruction “in its context”), *cert. denied*, 108 S. Ct. 1089 (1988).

¹¹ For this reason, the *Brown* majority’s reliance on the maxim *noscitur a sociis* (“[i]t is known from its associates”) would lead to the

The dissenters attempted to diffuse the force of this analysis by reading the word "arbitrary" to modify "influence of sympathy," not "factor"—thereby concluding that, comparably to the *Brown* instruction, it merely proscribed "arbitrary sympathy." Anderson Opin., App. A, 3-5. With all respect, that interpretation flies in the face of normal diction. See Ebel Opin., App. A, 36n.9.¹² In addition, "while strained in the abstract, [their] interpretation is simply untenable when viewed in light of the surrounding circumstances." *Brown*, 479 U.S. at 542.

opposite result here. 479 U.S. at 543; see BLACK'S LAW DICTIONARY 1209 (4th ed. 1957). Construing "'sympathy,' preceded by 'mere,'" in association with neighboring words like "passion" and "prejudice," the Court believed that rational jurors would view the charge as simply a list of invalid sentencing considerations: ones that did not relate to the evidence. See 479 U.S. at 542-43. But in light of the extra phrase in this charge, use of that common-sense maxim implies, if indeed it does not compel, Judge Ebel's reading—any influence of sympathy, tethered or not, falls under the heading of "arbitrary factors."

¹² Notably, a similar strained effort by *amicus curiae* California to construe the instruction before the Court as covering only arbitrary sympathy reveals the logically absurd endpoint of this counter-linguistic construction. According to *amicus*, a "commonsense" reading of the phrase "'other arbitrary factor'" in conjunction with the surrounding words yields the truly startling result that the charge "does not preclude the jury from considering any sympathy, sentiment, passion, or prejudice"—instead, "the jury may consider these factors when not arbitrary, but connected with the facts of the case." Brief of Amicus Curiae, The State of California, in Support of Petitioner, the State of Oklahoma 11-12. Otherwise stated, California apparently interprets the charge to allow, *inter alia*, for "some 'tethered' form of prejudice"! *Brown*, 479 U.S. at 549 (Brennan, J., dissenting); *but see id.* (asserting that "surely no one could maintain" that this "could ever be appropriate in capital sentencing deliberations"); *id.* at 543 (Rehnquist, J.) (prejudice, passion, and so forth, comprise list of improper influences on sentencing).

In *Brown*, the Court rejected the notion that the jurors would have ignored three days of favorable testimony adduced by the defense at the penalty proceeding on the basis of the anti-sympathy instruction. But the mitigating case put on by Parks was a far cry from Albert Brown's thirteen witnesses; respondent called only his father to attest to "what kind of person . . . he has been" (Tr. V, 665). To be sure, Parks Senior gave prototypical mitigating evidence about the son's disadvantaged background: his rootless childhood, motherless and partly fatherless as well, and his schooling marred by tensions stemming from court-ordered busing, all of which counsel drew upon in entreating the jury to grant mercy. See *Brown*, 479 U.S. at 545 (O'Connor, J., concurring); *Hitchcock*, 481 U.S. at 397 ("the difficult circumstances of his upbringing"); *Eddings*, 455 U.S. at 115 ("difficult family history"); Ebel Opin., App. A, 51-53. Yet hearing only the brief testimony of the father, so scant compared with the evidence in *Brown*, and reviewing it against the court's instructions, respondent's jurors, unlike Brown's, may well have assumed that it was nothing more than a "throwaway"—which they were being told to discard.

Such a conclusion would, moreover, have been devastating in the circumstances. By rejecting the "heinous, atrocious or cruel" and "continuing threat" aggravating factors and deliberating for several hours before returning the death penalty, the jury reaffirmed what the record made clear about the sadly routine nature of the crime and the criminal in this case. See *Jackson v. Virginia*, 443 U.S. 307, 328 (1979) (Stevens, J., concurring). As for the murder, this was a single-gunshot killing without any "torture, multiple wounds, or premeditation." McKay Opin., App. A, 5. As for the murderer, respondent had incurred a robbery conviction at age seventeen, which

arose from an unarmed "schoolyard scuffle" where the victim, a classmate, lost six cents and sustained only slight injuries (Tr. V, 669, 684-88). See McKay Opin., App. A, at 5-6. The dissent below accordingly erred in deducing that the jurors' failure to find two of the three *aggravating* factors, both unsupported, meant that the verdict necessarily rested on an individualized judgment of Parks based upon the *mitigating* evidence. See Anderson Opin., App. A, 15-16. Rather, one can likelier infer that in this setting of weak aggravation, even relatively light mitigation might have tipped the scales in favor of life—had the absolute anti-sympathy instruction not worked to suppress any merciful impulse aroused by that evidence.

In respondent's opinion, the majority's construction of the charge as globally banning sympathy amounts to its only natural reading. But whether we are right in our view or not, the "very plausibility" of that construction gives rise to "a significant prospect that a juror would interpret the instruction so as to restrict or obfuscate the duty to consider mitigating evidence." See *Brown*, 479 U.S. at 551 (Brennan, J., dissenting); see also *Mills*, 108 S. Ct. at 1867. Since a reasonable juror could therefore have understood the charge in this constitutionally forbidden sense, the dissenters' alternative exegesis cannot save it—or salvage respondent's sentence of death. See *Mills*, 108 S. Ct. at 1866-67 & n.9; *Andres v. United States*, 333 U.S. 740, 752 (1948) (Court reversed in federal capital prosecution, rejecting plausible Court of Appeals' interpretation of challenged charge to find "that under the instructions [which] the jury received, they might 'reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilt must stand unqualified'" by a recommendation of life); see generally *Brown*, 479 U.S. at 541; *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979).

The majority in *Brown* looked no farther than the charge at issue since the Court held that the "specific language" did not violate the Eighth Amendment. See 479 U.S. at 541-42 ("we hold that a reasonable juror would not interpret the challenged instruction in a manner that would render it unconstitutional"). Here, by contrast, where reasonable jurors would have construed the instruction in question to bar sympathy rooted in the record, one must examine the rest of the proceedings to determine whether they cured the error. See *id.* at 553-60 (Brennan, J., dissenting) (doing so); cf. *id.* at 546 (O'Connor, J., concurring) (stressing that on remand California Supreme Court should do so). Beyond question, they did not. The charge as a whole in no way corrected the forbidden message that the jury was bound to avoid *all* sympathy. At best, it conveyed conflicting signals that "did not remedy the unconstitutional effect of the anti-sympathy instruction," Ebel Opin., App. A, 54, while the prosecutor's statements both before and after the instruction only intensified the problem. The trial setting of the flawed instruction thus heightened the risk of harmful error.

Initially, as respects the rest of the charge, the court's general directions to consider any other mitigating factors and to rely upon the evidence could not override the specific instruction to avoid *any* influence of sympathy (see S. 6 and S. 9, J.A. 11-13). See generally Ebel Opin., App. A, 53-57. Notably, too, the latter instruction contradicted itself. In the same paragraph containing the anti-sympathy language, the court told the jurors to discharge their duties "impartially, conscientiously and faithfully" and to "return such verdict as the evidence warrants *when measured by these Instructions*." A few lines earlier, the judge had charged: "All of the previous instruc-

tions given you in the first part of this trial apply where applicable and must be considered along with these additional Instructions . . .” (S. 9, J.A. 13) (emphasis added). Since the injunction incorporated the guilt-phase anti-sympathy instruction (G. 10), *see supra* p. 3, it would actually have worsened matters. Thus, on the most optimistic assumption, the charge as a whole sent a mixed message to the jurors. On the one hand, it told them “to consider mitigating evidence.” But on the other, as the majority below perceived, it “told them not to consider [that evidence] in the most natural and significant way that they could do so—that is, with sympathy.” Ebel Opin., App. A, 58-59. As in *Francis v. Franklin*, *supra*, so too here, “language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.” *Id.*, 471 U.S. at 322; *see also Cabana v. Bullock*, 474 U.S. 376, 384n.2 (1986). That is especially true, moreover, when the prosecutor’s comments reinforce the impermissible words.

Prosecutor McKinney, on his part, played a very key role at the trial. By employing sympathy as a negative proxy for the entire category of mitigation adduced by respondent—thus anticipating and echoing the judge—McKinney effectively directed the jury to ignore respondent’s mitigating case, as beside the point. Yet because the sentence should relate directly to the criminal’s personal culpability, *see, e.g., Tison v. Arizona*, 481 U.S. 137 (1987), and “because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse,” this type of mitigation is extremely relevant and any sugges-

tion to the contrary subverts the whole purpose of a penalty proceeding.¹³

Instead of attempting to elicit a reasoned moral response from Parks’ jurors, McKinney encouraged them to view their task as mechanistic, their appropriate mindset as “cold-blooded” (J.A. 9), and their decision as foreordained. After the defense had made its plea at the penalty

¹³ *See Brown*, 479 U.S. at 545 (O’Connor, J., concurring); *see also Zant v. Stephens*, 462 U.S. 862, 879 (1983) (citations omitted) (what is important at selection stage is individualized determination based on “the character of the individual and the circumstances of the crime”).

The governing Oklahoma statute allows defendants to present evidence of any mitigating circumstance. 21 O.S. §701.10 (Supp. 1989) (unchanged in pertinent part from 1977); *Eddings*, 455 U.S. at 118 (O’Connor, J., concurring). Further, Oklahoma has chosen to permit full consideration of mitigating factors for all purposes (*see generally* S. 6, J.A. 10-12). This case therefore does not raise the issue, *cf. Boyde v. California*, 109 S. Ct. 2447 (1989), *granting cert. to* 758 P.2d 25 (1988), whether a state could permissibly restrict mitigating circumstances to those bearing solely on the offense rather than general background and character. *Penry v. Lynaugh*, *supra*, filed after petitioners’ brief, strongly intimates a negative answer to that question. *See id.*, 109 S.Ct. at 2946-52; *but cf.* at 2967-68 (Scalia, J., concurring in part in dissenting in part) (rejecting position of O’Connor majority that all mitigating factors must “be able to be considered for all purposes”); *Franklin v. Lynaugh*, 108 S. Ct. at 2330 (plurality of four, who dissented in part in *Penry*, suggested that states may “structur[e] or giv[e] shape” to jurors’ consideration of mitigating evidence); *see generally supra* p. 14 n.9. But clearly the question which petitioners pose—whether the state may “structure” the way in which jurors consider mitigating evidence so as to exclude sympathy wholly, *see Pet. Br.* 48—must be answered “no” for Oklahoma. Where a state (unlike Texas, whose sentencing system was involved in both *Penry* and *Franklin v. Lynaugh*, *supra*) has made mitigating evidence relevant *without limitation*, it may not forbid the jurors to give that evidence effect in their sentencing decision.

phase through evidence and argument, the prosecutor used his own closing to build upon the foundation he had laid during voir-dire for the claim that these should be disregarded. Ebel Opin., App. A, 65. He denigrated both respondent's case, a "pitch . . . for sympathy," and the jury's deliberative process—to him, a "cold turkey" affair from which the jurors had already assured him they would exclude any taint of sympathy. McKinney concluded: "[Parks] either did it or he didn't. He either deserves the death penalty or he doesn't, you know. You leave the sympathy, and the sentiment and prejudice part out of it (J.A. 75). By framing the issue as "[h]e either did it or he didn't" (a question that the jurors had just resolved against respondent), equating its answer with the answer to the question whether respondent should be sentenced to die (if he "did it," he "deserve[d] the death penalty"; if not, he did not), and enjoining the jurors to "leave the sympathy . . . part out of it," the prosecutor effectively told them that mitigating evidence had no place in the penalty decision.

None of respondent's jurors, moreover, could have mistaken the prosecutor's meaning. By asserting, without correction from the court, *see* Holloway Opin., App. A, *passim*, that the life-or-death choice was "not on [their] conscience" because "the criminal justice system . . . says when anyone does this, that he must suffer death"—"once your verdict comes back in, the law takes over"—he strongly implied that man's law mandates death for murderers. To nail the point down, he further relied on the law of God: "Now that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know" (J.A. 39-40). Yet whatever God's Biblical law may be, man's law calls for conscientious, individualized capital sentencing,

not automatic imposition of death based solely on the fact that the killer has "do[ne] such a horrible atrocious thing" (J.A. 40). *See generally* *Sumner v. Shuman*, *supra*; *Woodson*; *Roberts v. Louisiana*, 428 U.S. 325 (1976); *cf.* *Caldwell v. Mississippi*, 472 U.S. 320, 329-30, 341 (1985), quoting *McGautha v. California*, 402 U.S. 183, 208 (1971) (discussing jury's "truly awesome responsibility").¹⁴

Significantly, the possibility that "[i]n combination with" an anti-sympathy instruction, "the comments of the prosecutor may create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury" weighed on both the concurrer and the dissenters in *Brown*. *See* 479 U.S. at 546 (O'Connor, J., concurring), quoting *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring); 479 U.S. at 553-55 (Brennan, J., dissenting). We have in this marginal case for death a textbook illustration

¹⁴ Three judges below who concurred with Judge Ebel's disposition of the anti-sympathy instruction claim would also have reversed on the separate basis that prosecutor McKinney's remarks violated *Caldwell*, 472 U.S. at 328-29, by causing the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Holloway Opin. (Holloway, C.J., concurring and dissenting, with McKay and Seymour), App. A, 1-6; McKay Opin. (McKay, J., concurring in part and dissenting in part, with Holloway, C.J., and Seymour, J.), App. A, 1-26. *See Darden v. Wainwright*, 477 U.S. 168, 184n.15 (1986); *see also Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), *modified on denial of reh'g*, 816 F.2d 1493 (1987) (vacating sentence where jurors told that penalty decision was not on their conscience), *rev'd on other grounds*, *Dugger v. Adams*, 109 S. Ct. 1211 (1989). Respondent does not rely on these statements as an independent ground for reversal. He does, however, urge the Court to consider their role in augmenting the risk that the anti-sympathy instruction and comments misled the jury into ignoring the mitigating evidence.

of such ambiguity. See Ebel Opin., App. A, 64-68.¹⁵ Indeed, the risk that respondent's jurors did not consider his mitigating proof is especially strong since McKinney's comments denouncing sympathy, undermining jury responsibility, and implying that death was required in fact if not in form all worked together with the court's charge to convey the identical wrong-headed syllogism:

- (1) every person who commits a "horrible atrocious" murder must suffer death;
- (2) respondent committed a "horrible atrocious" murder;
- (3) therefore, respondent must die.

In the prosecutor's "anti-Lockett" taxonomy, the crime alone determines sentence. The killer's background and characteristics, his individuality, count for nothing. *But cf. Brooks*, 762 F.2d at 1413 (argument that defendant should "be killed merely because he is a criminal" subverts requirement of individualization).

¹⁵ E.g., compare *People v. Robertson*, 655 P.2d 279, 300n.22 (Cal. 1982), quoted in *Brown*, 479 U.S. at 553-54 (Brennan, J., dissenting) (prosecutor dismissed defendant's evidence of service in Vietnam as a "sympathy ploy") with J.A. 75 (Parks' sentencing summation condemned by prosecutor as "a pitch to you for sympathy"). In addition to making the above-quoted statements, the prosecutor capped his rebuttal summation by analogizing the jurors to soldiers who, in killing the enemy, but do what they are "required to do" (J.A. 83). Within the space of two pages of trial transcript, he used the words "required" and "duty" three times each in this same context (Tr. V, 729-30, J.A. 82-84). The Court of Appeals for the Eleventh Circuit has disapproved similar comments: "Conceiving of the jurors as soldiers undermines the crucial discretionary element required by the Eighth Amendment." *Brooks v. Kemp*, 762 F.2d at 1413.

Finally, petitioners' claim that the prosecutor's rote "reinforce[ment]" of the jury's duty to consider mitigation cured any damage inflicted by the anti-sympathy charge is wide of the mark. See Pet. Br. 22-23, 42. Aside from the fact that counsels' arguments cannot substitute for accurate instructions by the court, see *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978); Ebel Opin., App. A, 58, his Cook's tour of the minimum mitigating circumstances under Oklahoma law would likelier have had the opposite effect: indirectly confirming his equation of the type of mitigating proof adduced by Parks with forbidden sympathy. That is so because all of the listed factors but one pertain to either the nature of the crime or the condition of the defendant at the time the crime was committed and not to "broader considerations" of background or character, such as respondent relied on at trial (J.A. 27-32).¹⁶

Even the prosecutor's parsing of the lone exceptional factor, the defendant's lack of a significant record of criminal activity, would have done little or nothing to convey the relevance of Parks' mitigating evidence. First, it dealt solely with a narrow and specific kind of background evidence rather than personal history generally. Then, too, while the absence of previous criminal activity would surely militate for a defendant, it would notably *not* do so on account of a sympathy-inducing effect. Unlike the elder Parks' testimony about the unstable family life characterizing respondent's youth and the defense's penalty summation drawing on this account to stress that

¹⁶ See *Brown*, 479 U.S. at 557 (Brennan, J., dissenting). These enumerated circumstances do not appear in the governing statute but do form part of the standard charge at Oklahoma penalty proceedings (see S. 6, J.A. 11-12). Only the first—that "[t]he defendant has no significant history of prior criminal activity"—looks to the time preceding the murder.

the son "had started off with not a great deal, and not a great deal expected of him" (J.A. 56), proof of prior law-abiding conduct is relevant mainly to counter the inference—sometimes embodied in an *aggravating* factor—that the defendant, if spared, will persist in criminal behavior.¹⁷ While definitely mitigating in the sense that it "might serve 'as a basis for a sentence less than death,'" *Skipper*, 476 U.S. at 4-5, quoting *Lockett*, 438 U.S. at 604, such evidence, in contrast to Parks', does not play to juror compassion by seeking to explain a defendant's frailties through reference to his troubled background.

In this setting, McKinney's rehearsal of the minimum mitigating circumstances did no more than the charge as a whole to rectify the anti-sympathy message conveyed by the state to the sentencing jury. One must accordingly conclude, as did the court below, that the one-two punch of the court's charge and the prosecutor's comments in effect dispatched the mitigating case:

In light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that [Parks] did not deserve to be sentenced to death based upon his mitigating evidence. *Penry*, 109 S.Ct. at 2950.

¹⁷ See, e.g., 21 O.S. § 701.12 (1983) (Oklahoma scheme); *Franklin v. Lynaugh*, 108 S.Ct. at 2329 (discussing Texas scheme). Indeed, McKinney himself dealt with respondent's history in aggravating terms. He made virtually no distinction in his penalty summation between the purported non-existence of the mitigating factor and the presence of the aggravating factor that respondent would pose a continuing threat, segueing directly from a lengthy argument supporting the latter to a one-paragraph discussion of the former (compare J.A. 20-26 with J.A. 27-28).

In a matter of life and death, that possibility cannot be risked.

CONCLUSION

Petitioners' bombast notwithstanding, the Court of Appeals neither entered the realm of the jurors' mental and emotional processes nor switched the focus of the sentencing decision from the jury to the federal courts. See Pet. Br. 41, 42-43, 54-55. Instead, the majority merely applied the settled principles of *Woodson* and *Lockett* and the precise analysis called for in *California v. Brown*, *supra*, to the facts presented here. In so doing, they correctly found that the state's total preclusion of sympathy from Robyn Parks' penalty trial created the danger—especially intolerable in this marginal case for death—of blinding the jury to his human qualities and deafening their ears to his pleas for mercy.

The judgment of the Court of Appeals should therefore be affirmed.

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REPLY

BRIEF

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No. 88-1264
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

ROBYN LEROY PARKS,
Respondent.

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Robert H. Henry, Attorney General of Oklahoma, respectfully submits this as the Reply Brief of the Petitioners in the above captioned matter.

PROPOSITION I

SYMPATHY IS NOT CONSTITUTIONALLY REQUIRED IN CAPITAL SENTENCING.

The Respondent does not dispute that the trial court instructed the jury that it must consider not only the eight "minimum" mitigating circumstances listed in the instructions but also such other mitigating evidence as it, in its discretion, might find from the evidence. Jt. App 10-12, R. Vol II, Instruction 6. The Respondent also does not dispute that the prosecutor

himself discussed each of the "minimum" mitigating circumstances in turn and reinforced the court's instructions to consider them, along with anything else the jury might want to consider. Jt. App. 27-33. Clearly the jury was told to consider the Respondent's case in mitigation, and was properly instructed on the balancing of aggravating and mitigating circumstances. Equally clearly, neither the trial court nor the prosecutor erected any artificial barrier which prevented the defense from introducing whatever mitigating evidence it wished. Thus, the jury heard and was told to consider the mitigating evidence about the character and record of the offender or about the circumstances of the offense which this Court has characterized as a

constitutionally indispensable part of the process of inflicting the penalty of death. California v. Brown, 479 U.S. 538, 541 (1987).

If this death penalty is then to fall, it must be because the "anti-sympathy" instruction deprived the sentencing process of some constitutionally required factor, previously unrecognized, residing in the shadows of the Eighth Amendment. That factor can only be sympathy. Manifestly, sympathy is not mitigating evidence relevant to character, record, or the circumstances of the offense. Instead, it is the emotional reaction to such mitigating evidence. Instructing against sympathy in sentencing does not therefore result in withholding mitigating evidence.

Despite Respondent's suggestions to the contrary (Br. at 29), the Court below unquestionably entered into the mental and emotional processes of the jury in order to set aside the death penalty in a case in which that jury heard and was told to consider the mitigating evidence. App. A at 55, 860 F.2d at 1557. Only an overriding concern for the sympathetic consideration of Respondent's mitigating evidence would justify setting this death penalty aside. Such a concern is unwarranted and actually undercuts the "reasoned moral response to the defendant's background, character, and crime" which should characterize capital sentencing. California v. Brown, 479 U.S. at 545, O'Connor J. concurring.

Why Mitigating Evidence is important.

As Justice O'Connor has noted, evidence about the defendant's background and character is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. Id. Capital punishment should be directly related to the personal culpability of the criminal defendant. Id. However, the personal culpability of a murderer with a disadvantaged background, or with emotional or mental problems is not less because his life story engenders sympathy in the jury, but because his background or emotional or

mental condition may hamper his ability to understand or conform to the moral requirements we have adopted as a society. Evoking the pathos of a murderer's life (Br. at 3) does nothing to contribute to a reasoned and moral sentencing decision. Whatever emotional response it might raise with a jury, a life of neglect or suffering in no sense excuses murder, because the wrongs done the murderer simply do not justify the wrong he does his victim.

Yet the same life of neglect or suffering, considered in the light of reason, might well justify a lesser punishment than death because it shows the defendant never had the opportunity fully to actualize and to practice the moral principles we require in our society. Only in this

sense could evidence of character, background or circumstances of the offense truly excuse or reduce the personal guilt of the murderer.

In criminal's world the abstract moral precept "thou shall not kill" competes with a myriad of selfish motives which induce murderers to value their own needs over those of their victims. Some killers may be able to persuade the jury, in its reasoned moral sentencing decision, that they have a factor in their character, record, or in the circumstances of their offense which tends to excuse or diminish the wrongfulness and selfishness of their decision to kill. That reason must be a rational one, rather than one resting on caprice or

emotion. See our Brief in Chief at 33-37.

Consideration of evidence, not sympathy, is required.

Respondent struggles to equate juror sympathy for the murderer with consideration of mitigating evidence and thus with the individualized sentencing required by the Eighth Amendment. Br. at 7, 15. However the record in this case does not support this equation. The record demonstrates that the jury was instructed by the Court and told by the prosecutor that it must consider the mitigating evidence. The record likewise demonstrates that the Court instructed the jury to fulfill its task without sympathy, but conscientiously, impartially, and faithfully. The prosecutor also argued against

sympathy. Thus, it was sympathy which was forbidden, not consideration of mitigating evidence. Contrary to Respondent's suggestion, it is plain on the face of the record that the jury was told to consider mitigating evidence.

Further, despite Respondent's assertion to the contrary (Br. at 22), the instructions were not ambiguous or contradictory and did not send a mixed message. The "message" of the instructions was clear and unequivocal. The jury had to consider the eight "minimum" mitigating circumstances, plus any other mitigating circumstances it found in the evidence. The way in which that evidence was to be considered was without sympathy, sentiment, passion or prejudice and

conscientiously, faithfully and impartially. Thus, the rule of Francis v. Franklin, 471 U.S. 307, 322-24 (1985), does not apply to this case because a reasonable juror would find no contradiction in instructions to consider the mitigating evidence conscientiously, faithfully and impartially rather than with sympathy sentiment, passion or prejudice. A reasonable juror would find these instructions perfectly clear and without any contradiction at all.

In those cases in which the Court has struck down death penalties over errors in treatment of mitigating evidence, it has done so because the jury was somehow prevented from considering mitigating evidence at all (as in Hitchcock v. Dugger, 481 U.S.

393, 399 (1987) and cases cited therein), because the Court found a substantial probability that the jury was confused into not considering mitigating evidence (as in Mills v. Maryland, 486 U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384, 400 (1988)), or because the jury may have believed that there was no vehicle to give effect to the mitigating evidence and for expressing the view that the defendant did not deserve to be sentenced to death (as in Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 256, 283 (1989)). In each of these instances, some barrier prevented, or seriously risked preventing, the jury from considering or giving effect to the mitigating evidence at all. No such circumstance troubled the jury in

the current case. Properly instructed to consider both aggravating and mitigating evidence, and to weigh that evidence, the jury properly performed its sentencing function under the guided discretion law established by this Court. In no case relied upon by Respondent, or of which we are aware, has the Court ever invalidated a death penalty because the jury was instructed against sympathy and in favor of a conscientious, impartial, and faithful verdict.

This is as it should be. The individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence. California v. Brown, 479 U.S. at 545,

O'Connor, J. concurring. Manifestly, the jury considered the mitigating evidence and made its reasoned moral response to it.

Ironically, the challenged instruction in this case is intended to protect, not disadvantage, capital defendants. The admonition against sympathy, sentiment, passion, and prejudice serves to insulate the murderer from the natural emotional response of a lay jury to the facts of the murder for which it has found the defendant guilty beyond a reasonable doubt. The insistence of the court below (App. A at 58-59), echoed by the Respondent (Br. at 22), that the jury consider the evidence in the most natural and significant way--with sympathy--opens the door for sympathy

of a far stronger sort for the murderer's innocent victim. As the Court noted in Brown, sympathy would be far more likely to turn the jury against a capital defendant than for him. Id., 479 U.S. at 543. Respondent's theory, adopted by the court below, turns a protection for the defendant on its head and will, if adopted by this Court, result in more emotional and less reliable capital sentencing.

The court below appears to be alone in its interpretation of Brown. The Fifth Circuit has interpreted Brown more consistently with our view, and with a plain reading of Brown itself. Byrne v. Butler, 847 F.2d 1135, 1137 (5th Cir. 1988). Likewise, several state courts have considered the

sympathy issue and resolved it without the strained interpretation employed by the court below. People v. Emerson, 522 N.E.2d 1109, 1122 (Ill. 1987), cert. den. 109 S.Ct. 246 (1988); State v. Porterfield, 746 S.W.2d 441, 450-51 (Tenn. 1988), cert. den. 108 S.Ct. 1756 (1988); State v. Ramseur, 524 A.2d 188, 276-77 n.70 (N.J. 1987); State v. Steffen, 509 N.E. 383, 396 (Ohio 1987), cert. den. 108 S.Ct. 1089 (1988). Because the opinion of the court below incorrectly finds in Brown and in the Eighth Amendment a requirement of sympathetic consideration of mitigating evidence in capital sentencing we ask the Court to reverse the judgment of the court below and return the Eighth Amendment law of our Circuit to the

settled principles from which the court below departed.

CONCLUSION

The Respondent received individualized sentencing in his trial and the jury was properly instructed to consider his case in mitigation. The challenged "anti-sympathy" instruction enhanced the rational and reliable sentencing which is the goal of the Eighth Amendment in capital cases. The judgment of the court below adds an unjustifiable requirement of sympathetic consideration to capital sentencing to the two prerequisites held by this Court to be constitutionally required. We respectfully ask this Court to reverse the judgment of the court below and remove the additional requirement of

sympathetic consideration from the Eighth Amendment law of our Circuit.

Respectfully submitted,

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SEPTEMBER, 1989

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AMICUS CURIAE

BRIEF

5
NO. 88-1264

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JAMES SAFFLE, WARDEN, OKLAHOMA STATE
PENITENTIARY, GARY MAYNARD, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS,
ROBERT H. HENRY, ATTORNEY GENERAL
OF THE STATE OF OKLAHOMA,

Petitioners,

v.

ROBYN LEROY PARKS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE STATE OF
CALIFORNIA, IN SUPPORT OF PETITIONER, THE
STATE OF OKLAHOMA

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Supreme Court U.S.
FILED
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COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE STATE OF
CALIFORNIA, IN SUPPORT OF PETITIONER, THE
STATE OF OKLAHOMA

INTEREST OF AMICUS CURIAE

Amicus Curiae, the State of
California, has an interest in this case
as it was the petitioner in the case of
California v. Brown (1987) 479 U.S. 538
which upheld a California instruction that
the trier of fact is not to be swayed by

mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

A holding in this case concerning the Oklahoma instruction on sympathy, sentiment, passion, or prejudice may have some impact on the continuing viability of the holding of this Court in the *Brown* case.

Although the California Supreme Court has concluded the instruction approved in *Brown* should not be given in certain capital cases because it may mislead the jury (*People v. Malone* (1988) 47 Cal.3d 1, 39-42; *People v. Hamilton* (1988) 46 Cal.3d 123, 152 & fn.7), the court has upheld many California death judgments where the instruction has been given provided the jury was not misled as to its responsibility. (*People v. Malone, supra.*) Thus, language in a decision in this case that puts the *Brown* holding into

question could severely jeopardize these death judgments when they face review in the federal system on habeas corpus.

In addition, the California Supreme Court has relied on the holding in *Brown* to evaluate capital case penalty phase instructions in a commonsense manner by evaluating the evidence presented, arguments of counsel, and other instructions. A retreat from the *Brown* holding could put this mode of analysis into question as well as numerous California judgments upheld under this mode of analysis. (See e.g. *People v. Brown* (1988) 45 Cal.3d 1247, 1253-1256; *People v. Ghent* (1987) 43 Cal.3d 739, 777; *People v. Malone, supra*, 47 Cal.3d at p. 41; *People v. Hendricks* (1988) 44 Cal.3d 635, 652-653; *People v. Howard* (1988) 44 Cal.3d 375, 435-436.)

Thus, amicus has a significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

The Oklahoma instruction that the trier of fact is to avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence is constitutional.

The instruction when read as a whole and in a commonsense manner does not limit the consideration of mitigating evidence by the trier of fact, but does preclude the trier of fact from emotional responses unrelated to evidence concerning the offense and the offender. The key word in the instruction is arbitrary as it makes it clear the instruction is designed to advise the trier of fact not to consider arbitrary factors such as sentiment, sympathy, passion, or prejudice unrelated to the facts of the case. However, it does not prevent the trier of fact from considering mitigating evidence or emotions that are not arbitrary, but

are engendered by mitigating evidence relating to the offense and the offender.

In addition, in *California v. Brown, supra*, 479 U.S. 538, in different opinions, every justice of this Court indicated an instruction cannot be evaluated in the abstract. Rather, the instruction must be analyzed in light of the facts presented at the penalty phase and other instructions, (*Id.*, at p. 542 [Chief Justice Rehnquist joined by Justices White, Powell and Scalia]), or in light of arguments of counsel and the other instructions. (*Id.*, at pp. 544-563 [O'Connor J., concurring, Brennan J., dissenting, Blackmun J., dissenting].)

An evaluation of the Oklahoma instruction in light of the evidence presented at the penalty phase, other instructions, and the argument of counsel reveals the jury was not misled into believing it could not consider relevant

mitigating evidence. Rather, the instruction guided the jury's discretion so it did not consider emotions unrelated to the facts concerning the offense and the offender.

This Court has repeatedly held the death sentence must be based on reason rather than caprice and emotion. (See e.g. *Gardner v. Florida* (1977) 430 U.S. 349.) The instruction goes a long way in support of this concept.

ARGUMENT

THE OKLAHOMA INSTRUCTION ADVISING THE JURY TO AVOID ANY INFLUENCE OF SYMPATHY, SENTIMENT, PASSION, PREJUDICE, OR OTHER ARBITRARY FACTOR WHEN DETERMINING THE APPROPRIATE PUNISHMENT IS CONSTITUTIONAL.

The State of California, as amicus curiae, in support of petitioner, the State of Oklahoma, respectfully requests this Court uphold the instruction on sympathy given in this case.

The jury was instructed that:

"You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions." (See Parks v. Brown (10th Cir. 1988) 860 F.2d 1545, 1566 Anderson J., concurring & dissenting]; emphasis in original.)

This instruction is consistent with federal constitutional decisions of this Court. This Court has recently dealt with a similar instruction and concluded it did not violate the Eighth and Fourteenth Amendments of the United States Constitution.

In *California v. Brown, supra*, 479 U.S. 538, five justices of this Court upheld an instruction to jurors that they "must not be swayed by mere sentiment,

conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase.

Brown discussed the tension between two lines of authority. First, cases have repeatedly held that a capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his character or record and any circumstances of the offense. (*California v. Brown*, *supra*, 479 U.S. at p. 541; *Lockett v. Ohio* (1978) 438 U.S. 536 [plurality opinion]; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Franklin v. Lynbaugh* (1988) ____ U.S. ____, 101 L.Ed.2d 155, 170-171.) Yet, at the same time, the sentencer's discretion must be restricted so the discretion is not exercised in an arbitrary and capricious way. (*California v. Brown*, *supra*, at p. 541; *Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Franklin v. Lynbaugh*, *supra*, at ____, 101 L.Ed.2d 155, 170-171.)

The question at issue in *Brown* was whether an instruction designed to satisfy the principle that capital sentencing decisions must not be made on mere whim, but instead on clear and objective standards, violates the principle that the sentencing body is to consider any relevant mitigating evidence. (*California v. Brown, supra*, 479 U.S. at p. 544 [O'Connor J., concurring].)

The lead opinion of Chief Justice Rehnquist noted the California Supreme Court improperly focused solely on the word "sympathy" to determine the instruction interfered with the jury's consideration of mitigating evidence. This Court found, however, that a reasonable juror would not interpret the instruction in a manner that would render it unconstitutional.

It was also noted the respondent had improperly concentrated on the noun

"sympathy" and concluded the instruction did not pass constitutional muster. However, this interpretation ignored the fact the instruction advised the jury not to be swayed by "mere sympathy." This phrase advised a juror to ignore emotional responses that were not rooted in the aggravating and mitigating evidence introduced at the penalty phase. (*California v. Brown, supra*, 479 U.S. at p. 542.)

Thus, the instruction simply told the jury not to be swayed by sympathy unrelated to the facts of the case and the offender and did not preclude the jury from considering sympathy engendered by the evidence presented as to the offense and the offender.

In addition, this Court observed that:

"We also think it highly unlikely that any reasonable juror would almost perversely single out the word 'sympathy' from the other nouns which accompany it in the instruction:

conjecture, passion, prejudice, public opinion, and public feeling. Reading the instruction as a whole, as we must, it is no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty. The doctrine of *noscitur a sociis* is based on common sense, and a rational juror could hardly hear this instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating." (*California v. Brown, supra*, 479 U.S. at pp. 542-543.)

The instruction at issue is proper for the same reason. A hypertechnical reading of the instruction with emphasis on the word *any* could lead one to conclude that the instruction tells the trier of fact at the penalty phase not to consider any sympathy, sentiment, passion, or prejudice. However, such a reading would ignore the phrase "other arbitrary factor." If this phrase is read in conjunction with the instruction, it

becomes clear the instruction does not preclude the jury from considering any sympathy, sentiment, passion, or prejudice. Rather, it advises the jury not to consider arbitrary sympathy, sentiment, passion, or prejudice or such emotional factors that are unrelated to the facts surrounding the offense and the offender. However, the jury may consider these factors when not arbitrary, but connected with the facts of the case.

When read in this commonsense manner, the instruction is in the constitutional sense virtually indistinguishable from the instruction given in *Brown* as it only limits the jury's consideration of untethered emotions that are arbitrary and unrelated to the facts of the case.

In addition, the instruction does not refer specifically to the defendant. Thus, it tells the trier of fact at the penalty phases not to be swayed by

arbitrary factors in favor of the victim as well. Thus, for example, sympathy, sentiment, passion, or prejudice for victims are not valid considerations for the trier of fact. Rather, the trier of fact is to determine whether death is the appropriate punishment by considering the relevant evidence presented regarding the offense and the offender and emotion engendered by the evidence, not arbitrary emotion unrelated to the facts that were presented.

The problem with letting the jury consider emotions such as sympathy when unrelated to the facts is that it all too often is a two edged sword. If the jury can consider sympathy, it can also be swayed by a lack of sympathy for the offender because he is not good looking, does not speak well, or is of the wrong racial, ethnic, or religious persuasion. Thus, permitting a jury to consider

sympathy, passion, or prejudice is more likely to work against a defendant in a capital case than for the defendant. (*People v. Easley* (1983) 34 Cal.3d 858, 886 [Mosk J., concurring.]

The Oklahoma instruction, however, focuses the jury on the facts of the case relating to the offense and the offender and diverts the jury from considering arbitrary emotional matters.

Such an instruction, as noted, in *California v. Brown, supra*, passes constitutional muster.

"It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's 'need for reliability in the determination

that death is the appropriate punishment in a specific cases.'" (*California v. Brown, supra*, 479 U.S. at p. 543.)

Moreover, in *California v. Brown, supra*, every justice of this Court, albeit in different ways, agreed to a commonsense approach for evaluating whether a specific instruction passes constitutional muster.

The lead opinion written by Chief Justice Rehnquist and joined in by Justices White, Powell, and Scalia noted that: "If the specific instructions fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." (*California v. Brown, supra*, 479 U.S. at p. 541.) The opinion then examined the context in which the instruction was given noting that the instruction was given at the end of the penalty phase after respondent had produced 13 witnesses in his favor. The

opinion then notes the defense attack on the instruction would transform three days of favorable testimony into a virtual charade, and that a reasonable juror would reject the defense interpretation of the instruction. (*California v. Brown, supra*, 479 U.S. at p. 542.)

This opinion indicates an instruction given at the penalty phase must be evaluated in light of other instructions given and the evidence presented. Moreover, the concurring opinion of Justice O'Connor notes that:

" . . . the jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime." (*California v. Brown, supra*, 479 U.S. at p. 545 [O'Connor J., concurring]; emphasis added.)

In addition Justice O'Connor notes that the instruction at issue should be considered in conjunction with other

instructions and the prosecutor's closing argument to see if the jury was adequately informed of its responsibility to consider all of the mitigating evidence presented by the defense. (*California v. Brown, supra*, 479 U.S. at p. 546.)

"In combination with the instructions, the comments of the prosecutor may create a 'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury. (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 119 [O'Connor, J., concurring])." (*California v. Brown, supra*, 479 U.S. at p. 546 [O'Connor J., concurring].)

Moreover, the dissenting opinion of Justice Brennan, which was joined by Justices Marshall and Stevens, noted the interplay between the California sympathy instruction and argument of the prosecutor. (*California v. Brown, supra*, at pp. 547-560 [Brennan J., dissenting].)

Finally, the dissenting opinion of Justice Blackmun, which was joined by Justice Marshall, focused on the interplay of argument and the sympathy instruction. (*California v. Brown, supra*, at pp. 561-562 [Blackmun J., dissenting].)

Thus, all the justices of this Court sitting at the time of *Brown* determined that an instruction similar to the one at issue here could not be evaluated in a vacuum. Rather, the context in which the instruction arose must be analyzed. Consequently, the evidence presented, the arguments of counsel, and other instructions must be considered to determine whether the instruction passes constitutional muster. (See *People v. Brown, supra*, 45 Cal.3d 1247, 1255-1256; see too *Mills v. Maryland* (1988) ___ U.S. ___, 100 L.Ed.2d 384, 406 [Rehnquist C.J., dissenting].)

A review of the penalty phase under the guidelines of *Brown* reveals the instruction at issue here did not limit the consideration of mitigating evidence by the trier of fact. Instead, the instruction merely focused the jury on the facts relating to the offense and the offender so the jury did not act with unlimited discretion and consider arbitrary facts unrelated to the offense and the offender.

For example, the concurring and dissenting opinion of Justice Anderson below pointed out that the jury was told that it was authorized to consider all the facts and circumstances of the case whether presented by the state or the defense and whether presented at the first proceeding or the penalty proceeding. (*Parks v. Brown, supra*, 860 F.2d at p. 1566 [Anderson J., concurring & dissenting].)

Moreover, the jury was instructed that it could consider any relevant mitigating evidence.

"Your are further instructed that mitigating circumstances, if any, *must* also be considered by you, and although they are not specifically enumerated in the statutes of this State, the general law of Oklahoma and the United States sets up certain minimum mitigating circumstances for you to follow as guidelines in determining which sentence should be imposed in this case. . . . You are not limited in your consideration to the minimum mitigating circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine." (Parks v. Brown, *supra*, 860 F.2d at p. 1567 [Anderson J., concurring & dissenting]; emphasis in original.)

Thus, the instructions given clearly advised the jury that it could consider any mitigating evidence available. In light of these instructions, no reasonable

juror would believe he or she could not consider relevant mitigating evidence or valid feelings of sympathy, compassion, or sentiment.

In addition, the jury heard mitigating evidence as respondent's father testified as to respondent's character, personality, and childhood circumstances including the fact that respondent was the product of a broken home and his father had served time in prison. The prosecution also presented evidence bearing on respondent's childhood, character, and record as well. (*Parks v. Brown, supra*, 860 F.2d at p. 1567 [Anderson J., concurring & dissenting].)

In addition, the prosecutor advised the jury of its obligation to consider the mitigating evidence at the penalty phase. (Petn. p. 9.)

In light of the mitigating evidence presented, the argument of counsel, and

the instructions given, there is no basis for concluding the instruction at issue here precluded the jury from considering sympathy, passion, and sentiment for the respondent that was tied in with the evidence of the case relating to the offense and the offender. Rather, the instruction merely prevented the jury from considering emotional factors unrelated to the facts and from making a decision that was arbitrary and standardless.

In addition, unlike *Mills v. Maryland, supra*, ___ U.S. ___, 100 L.Ed.2d 384, nothing in the instruction or the sentencing process limited the jury's consideration of mitigating evidence. Rather, as noted, the instructions as a whole emphasized to the jury there was no

limitation on the mitigating factors the jury could consider.^{1/}

Under these circumstances the instruction on sympathy, sentiment, passion, and prejudice passed constitutional muster. Indeed, the instruction was beneficial to respondent, the state, and the judicial system.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida, supra*, 430 U.S. 349, 358.)

"(T)his court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as it humanly possible, that the sentence was not imposed out of *whim, passion, prejudice, or mistake.*" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329, fn. 2, & 349 {Rehnquist J., dissenting}; emphasis added.)

1. The scope of *Mills* is at issue before this Court in *McCoy v. North Carolina* (cert. granted Feb. 21, 1989) 88-5909.

Thus, the Oklahoma sympathy instruction at issue here should be upheld.

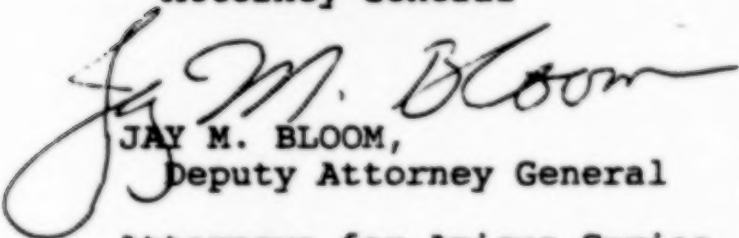
CONCLUSION

For all the foregoing reasons, amicus curiae, the State of California, respectfully requests the Oklahoma instruction at issue here be upheld.

DATED: May 22, 1989.

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SD89US0002

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 88-1264

State of Oklahoma vs. Robyn Leroy Parks
(Petitioner or Appellant) (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for State of California
California Attorney General's Office
(Please list names of all parties represented)

who IN THIS COURT is
☐ Petitioner(s) ☐ Respondent(s) ☒ Amicus Curiae
☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature J. M. Bloom
(Type or print) Name Jay M. Bloom
☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm California Attorney General's Office
Address 1110 West A Street, Suite 700
City & State San Diego, California Zip 92101
Phone (619) 237-7750

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 88-1264
October Term, 1988

JOHN K. VAN DE KAMP
Attorney General of
the State of California
JAY M. BLOOM
Deputy Attorney General

PEOPLE OF THE STATE OF
OKLAHOMA, Petitioner,

v.

110 West A Street, Suite 700
San Diego, California 92101

ROBYN LEROY PARKS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF AMICUS CURIAE as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Vivan Berger, Attorney at Law
435 W. 116th Street
New York, N.Y. 10027

Office of the Attorney
General

Attn: Robert Nance
112 State Capitol

Lewis Barber Jr., Attorney at Law
1528 N.E. 23rd Street
Oklahoma, Oklahoma 73111

Oklahoma City, Oklahoma 73105

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 31 day of May, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 31, 1989.

Barbara Renfrow
BARBARA RENFROW



JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991

Subscribed and sworn to before me
this 31 day of May, 1989.

John M. Burns
Notary Public in and for said County and State